No. 2332

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

B. A. & L. D. HOLLAND COMPANY, a corporation, *Appellant*,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation, *Appellee*.

GEORGE TURNER and BERTHA TURNER, husband and wife, *Appellants*,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation, *Appellee*.

H. J. SHINN and PHOEBE SHINN, husband and wife, *Appellants*,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation, *Appellee*.

W. H. KIERNAN and CHRISTINE B. KIERNAN, husband and wife, *Appellants*,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation, *Appellee*.

BRIEF OF APPELLEE.

Upon Appeals from the United States District Court for the Eastern District of Washington, Northern Division.

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NOTE: There is too much accentuation on the one hand, and too much slurring on the other, to permit our acceptance of complainants' statement

of the case as an accurate reflection of the case made by the evidence. The evidence, however, cuts so small a figure in the decision of any question presented, and is so utterly irrelevant to the principal questions involved, that we shall attempt neither correction nor ampler statement here, but will leave such matters for a subsequent portion of the brief, first taking up those points which are purely legal in character, and in the order in which they are discussed by counsel for the complainants.

I.

The Source and Quality of Title to the Land Within the Boundaries of Railroad Street.

Briefly stated, the first position assumed by complainants' counsel is this: The title to the right of way granted by section two of the Northern Pacific Land Grant Act is a base fee, subject to reversion, and inferior to the title passing under the aid grant contained in section three of the act. When the two titles meet, as when the right of way is located across an odd numbered section, the inferior, the right of way grant title, merges in the superior, the aid grant title, and thereby loses all the incidents which it pos-

sesses where it does not come in contact with the aid grant title. For the case at bar, it is said that as the tract in controversy is within an odd numbered section, it was acquired under the aid grant, although it is a part of the right of way, and therefore the Northern Pacific Railroad Company was at liberty to dispose of it as it chose, just as it could of any other land acquired under the aid grant.

There are two grants, it is true, contained in the Northern Pacific grant act, and the two may coincide, as here, where the right of way lies across an odd numbered section to which no rights of third parties have attached prior to the filing of the map of definite location. But the conclusion which complainants' counsel draw from the fact is a most patent *non sequitur*.

The corner stone of their argument, that the right of way title, passing under the right of way grant, is inferior to the title to the aid lands, passing under the aid grant, is palpably unsound. The right of way title is the prime, the superior title, and if under such conditions as are here present, there is a merging of an inferior in a superior title, the title under the aid grant merges in the title under the right of way grant to the whole right of way.

Just what are the incidents and dissimilarities in the two titles in question? It was held by the Supreme Court in *Railroad Company v. Baldwin,* 103 U. S., 426, *Bybee v. Railroad Company,* 139 U. S., 663, *Railway Company v. Hasse,* 197 U. S., 9, and *Stuart v. Railroad Company,* 227 U. S., 342, and by this court in *Nielsen v. Railway Company,* 184 Fed., 601, that two titles were contemplated by the act, one to the right of way lands and one to the aid lands, and the dissimilar incidents of the two which were essential to the decision of the questions presented in those cases were pointed out. Thus it was said in the *Stuart Case, supra*:

> "In this connection it is to be remembered that the grant of the right of way differed from the grant of alternate odd-numbered sections in that, while both were expressed in the words of a grant *in praesenti,* the former was without limitation or exception, while the latter was expressly made subject to the limitation or exception that it should not include any lands which, although public at the date of the grant, were sold, reserved or otherwise disposed of by the United States, or to which a pre-emption or homestead claim had attached, at the date of definite location. Of such a difference between an unconditional grant of a right of way and a qualified grant of alternate odd numbered sections this court said, in Railroad Co. v. Baldwin, 103 U. S., 426, 430: 'The uncertainty as to the ultimate location of the line of the road is recognized

throughout the act, and where any qualification is intended in the operation of the grant of lands, from this circumstance, it is designated. Had a similar qualification upon the absolute grant of the right of way been intended, it can hardly be doubted that it would have been expressed. The fact that none is expressed is conclusive that none exists. We see no reason, therefore, for not giving to the words of present grant with respect to the right of way the same construction which we should be compelled to give, according to our repeated decisions, to the grant of lands had no limitation been expressed. We are of opinion, therefore, that all persons acquiring any portion of the public lands, after the passage of the act in question, took the same subject to the right of way conferred by it for the proposed road.' "

A more vital distinction, so far as this case is concerned, is pointed out in *Smith v. Railroad Company,* 171 U. S., 275, and *Railway Company v. Townsend,* 190 U. S., 267, and is this: When title vests under the aid grant it is absolute, and the grantee may dispose of the granted land as it chooses. The title which vests under the right of way grant is not absolute, and the grantee must retain the granted land for railroad purposes, and may not dispose of or encumber it without the consent of Congress. To quote from the *Townsend case*:

"But, although there was a present grant, it was yet subject to conditions expressly

stated in the act, and also (to quote the language of the *Baldwin* case, 'to those necessarily implied, such as that the road shall be * * * used for the purposes designed.' Manifestly, the land forming the right of way was not granted with the intent that it might be absolutely disposed of at the volition of the company. On the contrary, the grant was explicitly stated to be for a designated purpose, one which negated the existence of the power to voluntarily alienate the right of way or any portion thereof. The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way. In effect the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted."

Congress, then, made two grants, each as entirely independent of and dissociated from the other as though between two private parties separate tracts of land had been conveyed by separate deeds containing dissimilar covenants and conditions. Apart from the distinctions in the nature and quality of the titles conveyed by the two grants which are noted in the foregoing decisions, others suggest themselves to the mind, and these, with those above noted, all convince that right of way grant title and aid grant title are two dis-

tinct entities, merger between which, so that the right of way title shall sink in and be extinguished by the aid grant title, is impossible without express Congressional permission. Some of the additional distinctions which occur are these:

Right of way grant and aid grant alike are *in praesenti*. But so far as the title to specific land is concerned, the right of way grant is first in time and is the base from which the aid grant is fixed. Not until the right of way has become fixed and certain; not until, consequently, title to the certain, definitely described lands within the right of way has become vested under the right of way grant, may title vest under the aid grant, for it is not until the right of way is fixed that it may be ascertained what lands are within the aid grant and will pass under it. The right of way title is therefore first in time and importance.

The right of way grant is of the particular; the aid grant of the general. The first conveys title to a certain, definitely ascertained strip of land across the public domain upon which the railroad is or is to be constructed. The second is dependent for its operation upon the first, and conveys title to such parcels of land referred to in the act as may be found within a certain distance on each side of the right of way when it

is located, and which may not, at the time of such location, be affected by the interest of third parties.

The right of way title across an odd-numbered section is superior to the aid title to the whole section because it is absolute (if the section was public land in 1864); the aid title is conditional. Thus for the case at bar, if some one had settled upon section 19 intermediate the date of the grant and the date of filing the map of definite location under the general land laws of the United States, his rights, howsoever good they otherwise were as to the remainder of the section, would be valueless with respect to the right of way. The settler's title, in other words, would be superior to the railroad's aid title, but inferior to its right of way title.

The right of way is granted that the grantee may construct its tracks upon it, and so bring into existence that which is the consideration for the aid grant. The aid grant is a bonus given as an inducement for the acceptance and use of the right of way.

The aid grant purposes that the lands granted thereby shall be sold and the proceeds of the sale devoted to the better enjoyment and utilization

of the right of way grant. The lands covered by the right of way may not be sold, but must be retained and devoted to the purposes for which they were granted.

So much for the distinctive features of the two titles; features which preclude thought of merger between the two and the consequent extinguishment of the marked characteristics which Congress impressed upon the right of way title for the furthering of the Congressional intent. Look now at the question of the merger of the right of way title where the right of way crosses an odd numbered section from the standpoint of mere reasonableness.

The right of way is granted "through the public lands"; "on each side of said railroad where it may pass through the public domain." There is no exception, reservation, or limitation; no distinction between the grant over odd numbered sections and over even numbered sections. It is an entire grant "through the public domain." Looking only to the granting words, the trial judge was clearly right when he said that "The grant of the right of way is an entirety and is held throughout by the same tenure and subject to the same limitations." To read exceptions into the grant, distinctions between the grant across

odd numbered and even numbered sections, would be not only to do violence to Congressional language but to impugn Congressional reason. It was said in the *Smith Case* (171 U. S., 275) and the *Townsend Case* (190 U. S., 272) that "By granting a right of way four hundred feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance," and it was therefore held that it was beyond the power of the railroad company to alienate any portion of its Congressionally granted right of way. We suppose it must be accepted that the Supreme Court perfectly apprehended the Congressional intent and correctly construed the Congressional language. So accepting, when we in addition endeavor to accept as sound the theory which counsel here posit, this situation results: Congress, after careful consideration, determined that a right of way four hundred feet in width across the public domain was necessary for a public work of such importance as the Northern Pacific railroad, and in granting such right of way did so upon the implied condition that the grantee should retain all the granted strip for right of way purposes, whether needed at the outset or not, and should be incapable of alienating

any part of it. But though using unrestricted language, apparently as applicable to the grant of a right of way across the public domain in an odd numbered section as in an even numbered section, in fact Congress did not consider or determine what width of right of way would be necessary across the odd numbered sections in the public domain, and so placed no implied condition upon its right of way grant across those sections. The Northern Pacific Company must therefore keep unimpaired its four hundred foot right of way across even numbered sections, but may whittle away at its right of way in the odd numbered sections on either side of each even numbered section until it has bare single trackage room, or nothing at all if it chooses, remaining for right of way purposes.

Respect for Congressional intelligence demands, we think, that it be held there is error somewhere; that either the Supreme Court erred when it declared in the *Smith* and *Townsend Cases* that Congress considered and determined what right of way was necessary across the public domain, or else that complainants' counsel err when they postulate a theory which is self evidently fallacious unless it be said that Congress confined its consideration and decision to the portions of the

public domain falling within the boundaries of even numbered sections.

We are told in support of counsel's theory that the aid title is superior to the right of way title that on the odd numbered sections the aid grant took effect first; that the filing of the maps of definite location did not fix the location of the right of way so that title to it would pass under the right of way grant; that until there was actual construction on the line of marked location the right of way was but a "beneficial easement, having no precision," and, consequently, title to the right of way did not pass under the right of way grant until there was "actual occupancy for purposes of construction." It is said that the aid grant stands on an entirely different footing; "That attains precision at the moment of filing the map of definite location." Therefore, it is thought, when the railroad company platted Railroad Addition it "had full fee simple title to section 19 * * * under the grant in aid, while its right of way was still a float, still a mere beneficial easement without precision. The full fee had vested under the grant in aid before there was an opportunity for the base fee of the right of way to attach."

The ordinary mind finds it difficult to follow

this course of reasoning, and, that feat achieved, is quite incapable of appreciating its soundness. There is a prevailing impression among the mere ordinary that a stream cannot rise higher than its source, and that a structure cannot be erected until there is a base constructed for it to rest upon. The aid grant is fixed with reference to "the route of said line of railway," and is of certain sections of land "on each side of said railroad line," not subject to prior claims "at the time the line of said road is definitely fixed, and a plat thereof filed," etc. Obviously the aid grant does not pass title to any specific land until there has first been a fixing of the right of way, and quite as obviously when the right of way is fixed title to it instantly vests under the right of way grant. Plainly the right of way grant is the base upon which the aid grant rests.

Neither can the ordinary mind comprehend how that which is without precision, definiteness, or certainty, a "float" which may settle anywhere or merely continue to float, can be the measure for and delimit that which is precise, definite and certain. Yet counsel argue with apparent gravity that the right of way delineated on the map of definite location, though but a nebula which requires time and the actual construction of a road-

way to give it form and fix its place, was of sufficient substance and certainty of location to serve as the base upon which the aid grant must rest; as the fixed center from which the boundaries of the aid grant might be ascertained.

While reason somewhat totters under such vigorous assaults upon it, the valiancy of counsel's attack upon reason is nothing as compared to their onslaught upon authority. Say they: "It is only the actual final survey, followed by actual occupancy for purposes of construction, that gives the right of way precision, and causes it to relate back. Prior to that time it is only a present beneficial easement, having no precision." That statement will only be the law in this jurisdiction when the decisions of this court and of the Supreme Court are overruled by some higher power.

In *Missouri etc. Co. v. Cook,* 163 U. S., 491, it was said:

> "We think that by the filing of the map of the line surveyed the route was definitely fixed, within the intent and meaning of the act, and while the principal object in filing the map was to secure the withdrawal of the lands granted, it also operated, and could not otherwise than operate, to definitely locate the line and limits of the right of way. And this view is sustained by previous adjudications of this court."

Commenting upon *Van Wyck v. Knevals,* 106 U. S., 360, where it was held that the filing of the map of definite location in and of itself definitely fixed the route of the railroad and thereby fixed the land to which it was entitled under the aid grant, the court said further:

> "The same conclusion necessarily followed in respect of the right of way. The grant of the lands and the grant of the right of way were alike grants *in praesenti* and stood on the same footing, so that, before definite location, all persons acquiring any portion of the public lands after the passage of the act took the same subject to the right of way for the proposed road. The easement and the lands were a float until by definite location precision was given to the grant and they became permanently fixed. *Railroad Co. v. Baldwin,* 103 U. S., 426."

The same rule was declared by this court in *N. P. R. Co. v. Murray,* 87 Fed., 648, where it was said:

> "The first question to be considered is whether the grant of right of way is fixed by the location of the road, as constructed, without reference to variations of such location from that shown by maps filed in the land office by the grantee company. If so, the company has a right of way, effective by relation from July 2, 1864, the date of the granting act, and has priority over the title under which the defendant in error claims. By section 3 of the granting act, the grant becomes definite when the line of road is defi-

nitely fixed, and a plat thereof is filed in the office of the commissioner of the general land office, so that the limits of the grant become fixed when the line of route is thus located. In this case such line was established by a map of definite location filed in May, 1884, nearly 20 years after the granting act was passed. It is undisputed that the right of way, as thus ascertained, was vested in the company as of the date of the act of congress, and it does not follow the line of construction where that deviates from the line of such location. Smith v. Railroad Co., 7 C. C. A. 397, 58 Fed. 513. It is conceded that the route must be considered as definitely fixed when its map of location is filed, upon the authority of decisions of the Supreme Court of the United States, where the question related to the limits of land grants, but it is sought to distinguish the question thus presented from that arising in this case. As to this, the Circuit Court of Appeals for the Eighth Circuit, in the case cited, says:

'But it is not perceived how the line of this railroad can be consistently held to be definitely and unalterably fixed, under the act of congress, by filing its map of definite location, and yet be subject to another and subsequent definite fixing, on a different line, by its actual construction; for this is simply to say that a line which is 'definitely fixed' is indefinitely changeable. Nor is it perceived how this act of congress can be held to give the company the power to select and definitely fix one line of railroad for the purposes of its land grant, and another and a parallel line for the purposes of its right of way.'

Every consideration upon which the land-grant companies are held to the lines of loca-

tion designated in maps filed for that purpose by them, when the question was with reference to the grant of lands, applies equally in cases involving rights of way. The company makes its own selection of route, and it takes its own time in doing so. It is not concluded by any survey and selection it may make. As stated by the court in Land Co. v. Griffey, 143 U. S. 32, 12 Sup. Ct. 362:

'It may survey and stake many, and finally determine the line upon which it will build by a comparison of the cost and advantages of each; and only when, by filing its map, it has communicated to the government knowledge of its selected line, is it concluded by its action.'

It is argued in this case that there is nothing in the act of congress that required the company to file a map of definite location; that the failure to do so simply had the effect to extend the time within which interests in lands within the limits of the grant might vest in others. This may be true, and, if so, it was open to the company not to signify its location of route by this method. It might have indicated its route by the construction of its road. But by whatever means it chose, if it had choice of methods, to signify its adoption of a line of route, when it had formally announced its selection the limits of its grant became fixed for all purposes."

There is, of course, no distinguishing the above decisions, and so it is clear that while a right of way line *may* be fixed by actual construction where no map of definite location has been filed, yet where such a map has been filed it is the highest

and best evidence of the location of the line, and is conclusive thereupon. Where no map of definite location was ever filed, the courts have permitted evidence to be given of a definite location by actual construction. They have permitted such evidence, however, only because the necessity of the case demanded it, and any evidence of that character would give way to the higher and better record evidence made by the filing of a map of definite location. Referring to former rulings of the land department relative to what would constitute the definite fixing of a railroad route by indicia upon the ground, it was said in *Tarpey v. Madsen,* 178 U. S., 215:

> "This unfortunate uncertainty and instability of title continued until the decisions of this court in Van Wyck v. Knevals, 106 U. S., 360, and Kansas Pacific Railway Company v. Dunmeyer, 113 U. S., 629, the first decided in October, 1882, and the latter in March, 1885. By those cases it was settled that the time at which the title of the railroad company passed beyond question was that of the filing of an approved map of definite location in the office of the Secretary of the Interior. This eliminated all oral testimony, and established a date at which, by record, the title of the railroad company should be considered as definitely ascertained."

The feature of the right of way title most relied upon as decisive of its baseness is its non-alien-

ability. The statement in the *Townsend Case* that "In effect the grant was of a limited fee" is quoted, and we are told, with much citation of Blackstone to establish the delicate point, that a limited fee is a base fee, that a base fee is not of so high a quality as a fee simple, and consequently that the base fee of the right of way grant merged in the fee simple of the aid grant whenever the two met.

We shall not pretend to equality in the learning here displayed. Neither shall we be so exacting as to expect consistency from counsel, and inquire why it is, if it be true as asserted on page 63 of complainants' brief that "the learning on the subject has but little, if any, place in the law of today" in distinguishing between exceptions and reservations, the rule does not hold equally good with respect to other rules of common law conveyancing. We steer clear of all such perplexing questions because we are unable to see how the learning of Blackstone can be of any aid in construing a modern railroad land grant. It would be much more reasonable to cite Stephens' Pleading and Tidd's Practice as authoritative upon questions arising under our modern codes of procedure. The Northern Pacific land grant was made by Congress to secure the performance of

a public work of great importance. To that end it made two grants and provided for two titles, ascribing to each such attributes as seemed best fitted to secure the results desired therefrom. It granted lands for a right of way, purposing that the railroad should be constructed and maintained thereon. It granted lands adjacent to the right of way, purposing that they should be sold and their proceeds used in aid of the construction and operation of a railroad upon the right of way granted. It denied to the grantee power to dispose of the lands granted for right of way, for to permit it to dispose of such lands at its pleasure might thwart the purpose of the grant. It gave to the grantee unlimited power of disposition of the aid lands, for to deny such power might thwart the purpose of that grant. Denial of the power to alienate no more stamped the right of way title with inferiority than the fact that the right of way title related back to the date of the granting act, cutting off all intervening rights of third persons, while the aid title, while relating back for some purposes did not cut off such intervening rights, stamped the aid title when it did vest with inferiority. All that can be said of the differing incidents is that Congress for the better effectuation of its purposes saw fit to endow

one title with certain attributes and the other title with certain other attributes. Each title within its limits, for its purposes, and with its incidents, is of equal quality with the other. The purpose of Congress in making a separate grant of the right of way and rendering the granted land inalienable is both apparent and established by authority, and obviously such purpose would be thwarted by calling the right of way title inferior and declaring its merger in the aid title when the two meet in an odd numbered section. To search for analogues among medieval estates and draw supposed analogies therefrom instead of exercising reason in arriving at the Congressional intent, is to go wool-gathering to ascertain a meaning instead of using common sense in the search.

It would seem quite clear, too, that if one title must merge in the other on odd numbered sections across which the road is constructed, the aid title is the one marked for submersion within the limits of the right of way. At the time of the enactment of the granting act, the projected route of the Northern Pacific lay for substantially its whole length through the public lands. Private ownerships were very few and far between. Congress granted a comparatively narrow but continuous strip for a right of way across the entire

public domain. To aid in the construction of a railroad on the right of way granted, it granted an empire on each side thereof. It was of immeasurably greater importance in the Congressional plan for this vast public improvement that the practically continuous strip it had granted across the western half of the continent for right of way purposes should be retained intact for such purposes, than that the company might be able to realize a very few more dollars from its aid grant by virtue of power to sell the few odd numbered sections across which the railroad might be constructed unencumbered by the right of way title.

The thought just adverted to may be put in another way. Complainants are seeking the aid of a court of equity to establish a merger of titles. In an action at law, had they established a meeting of a greater and lesser estate, merger would have been declared. But

> "In equity, the rules of law as to merger are not followed, and the doctrine of merger is not favored. Equity will prevent or permit a merger as will best subserve the purposes of justice and the actual and just intent of the parties. Wherever a merger would operate inequitably it will be prevented. The controlling consideration is the intention, expressed or implied, of the person in whom the estates unite, provided the intention be just

and fair, and a merger will not be permitted contrary to such intent."

16 *Cyc.,* 665.

Stated more strongly

"Merger is not favored in equity, and is never allowed, unless for special reasons, and to promote the intention of the party."

4 *Kent's Comm.,* p. 102.

When dealing, as here, with a public grant, made to secure a great public improvement, a different element enters into the situation. In conveyances between private parties, the intent and interests of the grantee are alone to be considered. Here the intent and interests of the grantor are the dominant factors, for the grant was a benefaction, made in order to secure the performance of a public work which Congress, as the representative of the whole nation, desired. The grant, in particular of the right of way, was hedged about with such limitations as Congress deemed necessary in order to secure the performance of the work. The principal limitation upon the right of way title was that the grantee should be incapable of surrendering its ownership and control of and over the right of way, for to permit it to do so might render it impossible for it to perform the desired work. To quote from another portion of the *Townsend* opinion:

> "To repeat, the right of way was given in order that the obligations to the United States assumed in the acceptance of the act might be performed. Congress having plainly manifested its intention that the title to and possession of the right of way should continue in the original grantee, its successors and assigns, so long as the railroad was maintained, the possession by individuals of portions of the right of way cannot be treated without overthrowing the act of Congress as forming the basis of an adverse possession which may ripen into a title good as against the railroad company."

Not reasonably may there be imputed to Congress an intent when granting a right of way across the entire public domain lying in the path of the road, that upon each alternate section the right of way title, granted for the purpose and with the limitation above stated, should merge in the aid title, so that the grantee might dispose of its right of way as it chose, even though thereby "the obligations to the United States assumed in the acceptance of the act" might *not* be performed.

Picking up some stray threads in counsel's argument to conclude this head:

Referring to the separate nature of the right of way grant on the authority of *Railroad Company v. Baldwin,* the trial judge said in the opinion of dismissal:

> "The grant of the right of way is an entirety and is held throughout by the same tenure and subject to the same limitations."

Apparently counsel suppose that when the learned judge said "entirety" he meant "continuity," and that when he spoke of the "grant of the right of way" he meant not merely the right of way granted by the United States, but also such as it might be necessary for the railroad company to acquire from private ownership by purchase or condemnation. On the basis of that notion, they very satisfactorily convict the judge of gross error in the quoted statement. Possibly the setting up of straw men for the successful demolition which their quality ensures is a pleasing occupation, but it is scarcely profitable. The trial judge spoke, of course, of the right of way granted by Congress across the public domain, and meant that such grant was not interrupted by section lines, but was held by the same tenure and was subject to the same limitations across odd numbered sections that it was across even numbered sections. The language of the grant permits no other construction.

While a pleasant field for speculation is opened by counsel's cogitations concerning the effect upon the right of way title had the road been con-

structed upon the south half of section 19 after the map of definite location had fixed its situs on the north half, we must decline to wander in it. With equal profitableness one might speculate upon the effect upon both right of way title and aid title of a change 100 miles to the south of section 19, an abstract question the Supreme Court has twice declined to answer (*Van Wyck v. Knevals,* 106 U. S., 369; *Missouri etc. Co. v. Cook,* 163 U. S., 498), and has committed itself no further than to say in *N. P. R. Co. v. Smith,* 171 U. S., 268, that "only the United States could complain of the act of the company in changing the location of its tracks from that previously selected." We might conjecture that if the supposititious change had been made the United States could have declared a forfeiture of the right of way grant, or if it failed to take such action, that the land contained therein might have passed by a conveyance of the whole section. We are dealing with a right of way not abandoned for right of way purposes, but actually built upon and used for railroad purposes, and speculations as to where the title to a right of way selected by the filing of a map would vest if the company should subsequently build elsewhere are of no aid in determining whether, when selected and occupied,

the title to the right of way is held under the right of way grant or the aid grant.

To repeat, Congressional intent is decisive of the question involved. Every other consideration gives way to that. No aid in arriving at such intent can be obtained by attempting to apply obsolete conveyancing terms and rules to the Congressional grants. Upon authority and from reason it is plain that the prime grant contained in the Northern Pacific act was that of the right of way. It was given to assure, so far as Congress could assure, an unbroken line of communication, of abundant width for railway purposes, from Lake Superior to Puget Sound. To make sure that its bounty should not be misused and its purpose thwarted, Congress forbade the alienation of any part of the right of way or its diversion to other than railway uses. To further its purpose in the making of the right of way grant, it made the aid grant, a contingent grant, the boundaries of which were to be located from the right of way grant when it should be located, and the lands in which were to be sold to aid in the construction of a railroad on the right of way. The mere statement of these undeniable facts convinces that Congress did not intend the aid grant to be the superior

title, in which the right of way grant would merge where the right of way crossed an odd numbered section, so that the grantee might dispose of its right of way across each such section at its pleasure. To provide for this would be to break up the entirety of the grant, and render useless the precaution which admittedly Congress took with respect to even numbered sections of forbidding alienation or diversion of the right of way thereacross in order that the continuity of the railroad line might not be imperilled. To ascribe to Congress an intelligent and definite policy with respect to the right of way across even numbered sections, and an entirely different policy or utter want of policy with respect to the right of way across odd numbered sections, is to convict Congress of incredible stupidity. Hardly should this be done on the strength of a little archaic learning on the subject of ancient estates.

II.

Power of the Railroad Company to Dedicate Railroad Street.

The main track of the Northern Pacific Railroad Company, as shown on the map of definite location and as actually constructed and always thereafter and now maintained, lies in the center of

Railroad Street as platted. Railroad Street, consequently, being 225 feet in width, occupies the heart of the original right of way of the Northern Pacific, only a comparatively narrow strip of the original way bordering it on either side. Moreover, the company had sold those bordering strips prior to the act of 1904 validating such conveyances of the right of way, so that it now retains nothing for its right of way but Railroad Street, under the proviso of that act "that no such conveyance shall have effect to diminish said right of way to a less width than one hundred feet on each side of the center of the main track of the railroad as now established and maintained." And the question is whether it was within the power of the railroad company to dedicate what is now its entire right of way as a street.

At the outset of their discussion of this question, complainants' counsel, admitting that an attempted conveyance of any part of the right of way for private purposes would have been a nullity under the *Townsend Case,* seek to remove the dedication of Railroad Street from the operation of the rule there declared upon the ground that the dedication was a conveyance for public purposes, a thing not forbidden by the granting act. Putting this plan for evading the rule in the

most plausible form in which their art can present it, it is argued that "so far as necessary public uses are concerned," it is impossible to discriminate "between a cross street and a longitudinal street" in the use of the right of way for street purposes; that use of the right of way for highway purposes is as much a public use as for railway purposes; and that there is no question of disabling the railroad company from performing its public functions but only of its "mere present convenience and advantage."

The real question presented here cannot be so blinked. No amount of quibbling and evasion can disguise and prevent it being seen in the naked form in which it must be answered.

If the Northern Pacific right of way through the heart of the business portion of the City of Spokane has been dedicated as a street, then a street it is, with each and every incident and attribute of each and every other street in the city, to its full width (since the validating act of 1904) of 200 feet. There is no such conundrum as: "When is a street not a street?" Under the laws of Washington, Railroad Street is either a public highway, with all the incidents attached thereto, or else it is the right of way of the railroad company, held in the same manner and for

the same uses as the remainder of its right of way. There is no middle ground.

The statutes of Washington provide:

> "Whenever any city or town has been surveyed and platted, and a plat thereof showing the roads, streets, and alleys has been filed in the office of the auditor of the county in which such city or town is located, such plat shall be deemed the official plat of such city or town, and all roads, streets, and alleys in such city or town, as shown by such plat, (shall) be and the same are declared public highways: Providing, that nothing herein shall apply to any part of a city or town that has been vacated according to law."
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> 2 *Rem. & Bal. Code,* §7835.
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> "All streets declared public highways under the provisions of this and the last preceding section shall be under the control of the corporate authorities of the respective cities."
>
> *Ibid,* §7837.
>
> "Every donation or grant to the public, or to any individual or individuals, religious society or societies, or to any corporation or body politic, marked or noted as such on the plat of the town, or wherein such donation or grant may have been made, shall be considered, to all intents and purposes, as a quit-claim deed to the said donee or donees, grantee or grantees, for his, her, or their use, for the purposes intended by the donor or donors, grantor or grantors, as aforesaid."
>
> *Ibid,* §7853.

The rule with respect to street dedications is:

"An owner may grant whatever estate he sees fit, and may annex conditions and limitations to his grant at his pleasure, provided that such limitations and conditions are not inconsistent with the dedication and will not defeat the operation of the grant. A condition or limitation which would render the dedication ineffectual cannot be annexed: thus, a man cannot reserve possession to himself, nor reserve a right to do anything in the way which will destroy its character as a public way. Nor can there be a valid dedication to a part only of the public, since this would be repugnant to the purpose of the dedication, and by limiting the right to use the way to designated individuals or classes of persons, the general public would be excluded, and this would render it impossible for the public to complete the dedication by an acceptance. The donor cannot as we have already seen, annex to the dedication a condition that the way shall be under the control of other public or corporate officers than those invested by law with the government of the local territory within which the ways are situated, nor can he, as a rule at least, annex any condition which will have the effect to take from the proper local authorities the power to improve the way in the same mode as other public ways of the locality are improved."

1 *Elliott, Roads & Streets* (3d Ed.), §163.

Holding ineffective an attempted reservation in the dedication of a street of the exclusive right to lay street railway tracks therein by the dedicator, the above rule was approved by the Supreme Court of Washington in *State etc. vs. Street Ry. Co.,* 19 Wash., 518, and it was said that "If any

condition is annexed to such dedication, the condition falls, but the grant stands."

Be it remarked in this connection, that if it be held there was power in the Northern Pacific Railroad Company to dedicate its right of way as a street, then the statutes and the decisions of the Supreme Court of Washington are controlling as to the incidents which attach to it as a street. If the right of way is removed from the protection of the Congressional grant, then like all other property in the state it is fully amenable to the state laws.

If, then, the Northern Pacific Railroad Company could and did dedicate its right of way as a street, what was the extent of the dominion thereover which it surrendered under the laws of the state? First and foremost, the dedication, under §7853, *supra,* operated as a quit-claim deed to the right of way, and under §7837, *supra,* it was placed "under the control of the corporate authorities." The extent of the control is made clear by the statute dealing with powers of cities of the first class, of which Spokane is one.

> "Any such city shall have power—
>
> To lay out, establish, open, alter, widen, extend, grade, pave, plank, establish grades, or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks, and other public

grounds, and to regulate and control the use thereof, and to vacate the same, and to authorize or prohibit the use of electricity at, in, or upon any of said streets, or for other purposes, and to prescribe the terms and conditions upon which the same may be so used, and to regulate the use thereof;

To change the grade of any street, highway, or alley within its corporate limits, and to provide for the payment of damages to any abutting owner or owners who shall have built or made other improvements upon such street, highway, or alley at any point opposite to the point where such change shall be made with reference to the grade of such street, highway, or alley as the same existed prior to such change;

To authorize or prohibit the locating and constructing of any railroad or street railroad in any street, alley, or public place in such city, and to prescribe the terms and conditions upon which any such railroad or street railroad shall be located or constructed; to provide for the alteration, change of grade, or removal thereof; to regulate the moving and operation of railroad and street railroad trains, cars, and locomotives within the corporate limits of said city; and to provide by ordinance for the protection of all persons and property against injury in the use of such railroads or street railroads."

2 *Rem. & Bal. Code,* §7507, Subds. 7, 8 and 9.

The extensive power of such cities in dealing with their streets and the use thereof is illustrated in *State etc. vs. Spokane,* 24 Wash., 53, *Spokane vs. Thompson,* 69 Wash., 650, *Spokane vs. Rail-*

road Companies, 135 Pac., 636, and the many cases therein cited.

And if there was a dedication of the right of way as a street, the surrender of control over it was not for use for street purposes alone. It is within the discretion of the corporate authorities to determine when a dedicated street has outlived its usefulness as a street, and to declare its vacation as such.

> "Any person or body corporate in any city owning an interest in any real estate abutting upon any street or alley who may desire to vacate such street or alley, or any part thereof may petition the city council of such city or town to make vacation, giving a description of the porperty to be vacated, which petition shall be filed with the city clerk of said city or town; and (if said petition shall be signed by the owners of more than two-thirds of the private property abutting upon the part of such street or alley sought to be vacated) said city council shall, by resolution, fix a time when said petition shall be heard and determined, which time shall not be more than sixty (60) days, nor less than twenty (20) days after the date of the passage of such resolution and upon the passage of such resolution it shall be the duty of the city or town clerk to give twenty (20) days' notice of the pendency of said petition by a written or printed notice set up in three (3) of the most public places in said city or town and a like notice in a conspicuous place on the street or alley sought to be vacated, which said notice shall contain a statement that a petition has

been filed to vacate said street or alley which shall be described in said notice, together with a statement of the time and place fixed for the hearing of said petition."

2 *Rem. & Bal. Code,* §7840.

"At the time appointed for the hearing of said petition or at such time as the time may be adjourned to by the city council, the same shall be heard, and if the council shall determine to grant said petition or any part thereof, such city or town shall be authorized and have authority by ordinance to vacate such street, or alley or any part thereof."

Ibid, §7841.

"When any street, alley or public way in any incorporated city or town in this state has heretofore been or may hereafter be vacated by the council or legislative body of said city or town, the property within the limits of any such street, alley or public way so vacated shall belong to the abutting property owners, one-half to each, unless within six months after the taking effect of this act, any person or corporation, who may feel himself or itself aggrieved by such a division, may commence an action in the proper courts of this state to determine the title to any such street, alley or public way so vacated."

Ibid, §7842.

The vacation of streets is an exercise of a legislative function, and the action of the corporate authorities in that behalf is reviewable by the courts only when fraud or collusion is present.

Ponischil vs. Hoquiam R. Co., 41 Wash., 303.

Mottman vs. Olympia, 45 Wash., 361.

It follows that if Railroad Street was actually dedicated as a street it is within the power of the municipal authorities, through the process of vacation, to take the title to the entire Northern Pacific right of way from the company and vest it in the abutting owners.

To digress for a space from the question of the extent of municipal control over Railroad Street if it is a street to the purposes of the right of way grant and the uses to which it may be put.

Complainants' counsel say that the Northern Pacific Railroad Company "could not alienate the fee of its right of way or any part thereof to a private individual." Apart from that, say they, "there is only one limitation on either a public or private use which may be permitted, and that is, that the use permitted do not disable the railroad company in the performance of its public functions."

A railroad company "is not at liberty to alienate any part (of its right of way) so as to interfere with the free exercise of the franchises granted."

Grand T. R. R. Co. vs. Richardson, 91 U. S., 454.

This declaration has but to do with the general powers of all railroad companies. It is the

declaration of a policy which is nation wide, and is established by court decisions, not by statute. It is as applicable to rights of way acquired by purchase or condemnation as to those given by public grant. There is more than that involved in this case. Here we have a public grant, and it is hedged about with limitations prescribed for the purpose of securing the full and free working out of the Congressional intent. It will not do, therefore, to judge the measure of the Northern Pacific Railroad Company's power over its right of way solely by the general policy embodied in the above quotation, nor by decisions of like import upon which complainants' counsel rely. Decisions construing the grant must be looked to to ascertain what, if any, additional limitations to those prescribed by general public policy Congress saw fit to impose upon the grant.

Your Honors said in *N. P. R. Co. vs. Spokane,* 64 Fed., 506, that in the Northern Pacific right of way grant there was an implied limitation "that the Railroad Company might not divert the granted strip to other and foreign uses, and might not cede to the public rights and easements so extensive or of such a nature, as to interfere with its duties to regularly and properly operate a railroad." The Supreme Court said of the

grant in *N. P. R. Co. vs. Smith,* 171 U. S., 260, 275, that "By granting a right of way four hundred feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance." And in the *Townsend Case* (190 U. S., 267) the Supreme Court said that "The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad"; that it could not be "rightfully contended that the portion of the right of way appropriated was not necessary for the execution of the powers conferred by Congress," the decision of Congress as to the necessary width, embodied in the grant, being conclusive; and that "the right of way was given in order that the obligations to the United States assumed in the acceptance of the act might be performed."

Whatever of comfort there may be in the suggestion which complainants' counsel make, that these expressions "ought to be looked at in the light of the precise case before the court," they are welcome to. An authoritative construction of a public grant is none the less controlling when the construction is subsequently called in question because the cases are not "precisely" the

same. The highest courts of this jurisdiction have declared certain principles with respect to the Northern Pacific right of way grant. Those principles are directly involved in this case. Why are they not controlling? Said this court of the power of the railroad company to deal with its right of way, it "might not divert the granted strip to other and foreign uses, and might not cede to the public rights and easements so extensive or of such a nature, as to interfere with its duties to regularly and properly operate a railroad." That declaration, of course, does not foreclose the question whether the dedication of a longitudinal section of the right of way as a public highway is a diversion to foreign uses or such a cession as would interfere with the regular and proper operation of a railroad, but it certainly is conclusive upon the question that if it was such a diversion or would so interfere, it was not within the power of the railroad company to make it. So the declaration in the *Townsend Case* that the consideration for the grant "was the perpetual use of the land for the legitimate purposes of the railroad," and was given "that the obligations to the United States assumed in the acceptance of the act might be performed," does not establish that the dedication in question

would prevent the due performance of those obligations. But if it should appear that it would, the rule of construction so declared is authoritative, and would render the dedication nugatory.

Obviously the dedication of the right of way as a street, particularly when it lies through the center of a city of the size of Spokane, will interfere with the operation of a railroad upon the right of way, and prevent the performance of the obligations which was the condition of the grant. The statute provides that the dedication "shall be considered, to all intents and purposes, as a quit-claim deed." The dedicated street "shall be under the control of the corporate authorities." Under Subd. 7 of §7507 the city would have power, *inter alia,* to "grade, pave, plank, establish grades, or otherwise improve the street"; to "regulate and control the use thereof, and to vacate the same," etc. Under Subd. 8 it might change the grade of the street. Under Subd. 9 it might authorize or prohibit the construction of a railroad or street railroad in the street, prescribe the terms upon which such railroad or street railroad should be constructed; regulate the method and manner of operation of any railroad thereon; do, in short, anything it thought proper to do with respect to the use of the street

for street purposes. Changes of grade, lighting, paving, parking, aught else which the city might consider would render the dedicated strip more useful or desirable for street purposes, could be ordered, for if there is a street there, railway use must give way to street use, at least to any point short of actual extinction. The city might authorize the erection of telephone, telegraph and electric light poles therein, permit its use by other railroad and by street railroad companies, limit the number of tracks the company could maintain thereon, forbid the use of steam as a propulsive power thereover, make any other regulation which it thought necessary to the safety of general travel on the street, no matter how much such regulations might embarrass the operation of the railroad. Such powers does the statute clearly give, and such would be the city's powers over its streets if the statute were less explicit than it is.

> "A municipal corporation cannot, by contract, surrender or alienate its governmental and police powers, which the public welfare demands that it should exercise. All rights granted by the municipality or contracts made by it with reference to the use of its streets are subject to its exercise of such powers, and a railroad company which secures the right to use the streets of a city takes such right subject to all reasonable

regulations and ordinances enacted by the city in the exercise of its police power. Thus, it has been held that a municipality may enact and enforce an ordinance requiring a street railway company to keep down the dust by sprinkling its tracks; that it may, by ordinance, require the company to have some employe or agent on each car in addition to the driver, or to remove snow thrown up by the snowplows of the company; that it may temporarily remove the tracks of a street railway company, when necessary, in order to construct a sewer or culvert, or even require a change of track from one part of a street to another, or a bridge to be removed, or a tunnel to be lowered, and that such a company may be enjoined from digging into the street and rebuilding without the consent of the city authorities where the city has authority to prescribe the manner in which corporations shall exercise any privileges granted them in the use of its streets. So, as we have elsewhere shown, a municipal corporation may enact reasonable ordinances limiting the rate of speed at which trains shall be run, and prohibiting the obstruction of its streets by either commercial or street railway companies."

3 *Elliott, Railroads* (2d Ed.), §1082.

"As to the first question above suggested, it may be stated as a general proposition well established by the authorities that a city has absolute control over its streets and every part thereof, for the purpose of constructing sewers, or making other improvements which the welfare of the city demands; and unless there is some special allegation which shows that a different rule prevails as to the street in question, this general rule must be held

to establish the affirmative of said proposition."

Spokane St. Ry. Co. vs. Spokane, 5 Wash., 634.

And see:

Richmond etc. Co. vs. Richmond, 96 U. S., 521;

Baltimore vs. Trust Company, 166 U. S., 673;

So. Pac. Co. vs. Portland, 227 U. S., 559;

Pittsburg etc. Co. vs. Hood, 94 Fed., 621;

Newport etc. Co. vs. Hampton etc. Co., 47 S. E., 842;

Petersburg vs. Acqueduct Co., 47 S. E., 849.

We must in this day concede to the Congress of 1864 something of prescience. Whether it foresaw all that has come and is yet to come to pass upon the Pacific Coast cannot be said. But plainly it forecasted much, and to secure the speedy development of the Northwest empire, and to assure for it adequate means of access and egress when it should be developed, it made the Northern Pacific grant. In all the courts the Congressional intent has been recognized and enforced. The right of way grant was made, have said the courts whose decisions control here, "in order that the obligations to the United States

assumed in the acceptance of the act might be performed," and it may not be diverted to "other and foreign uses," nor may there be ceded to the public therein "rights and easements so extensive or of such a nature as to interfere with its duties to regularly and properly operate a railroad." So it has been held that it was contrary to Congressional intent for the farmer in the country or the abutting lot owner in the city to acquire a right to even the smallest strip of the right of way because "by granting a right of way four hundred feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance." But, say counsel, those decisions are not controlling, not even influential here, because they dealt with the acquirement of private rights by private individuals, while here it is a question of the acquirement of public rights by the public. Where, pray, is there in the Northern Pacific grant any word of discrimination between private right and public right; any suggestion that while a private individual cannot acquire any right, however small, in the right of way, the public may acquire any desired right therein, no matter what its nature and however great? And where is there reason for the dis-

crimination which is urged whereby the individual may not acquire the smallest strip of the right of way, though his ownership does not and never could affect the practical operation of the road, while the municipality may acquire a whole section of the right of way for street purposes, to the inevitable interference with, if not complete disablement of, railroad operation? The words "private right" and "public right" mean nothing in this connection. The Northern Pacific right of way was granted for a public use, it is true, but it was for a particular public use, not general public use. It was granted for railway, not highway use. It was granted for the purposes of a great transcontinental railroad in the operation of which the nation is interested, not for the purposes of a city street in the maintenance of which one municipality alone is interested. It needs no evidence, it needs no authority, to establish that the one use is utterly incompatible with the other. One or the other must give way, for a transcontinental railroad handling the enormous traffic which the Northern Pacific Railway does manifestly cannot operate its road in the center of a city street, along which as well as across which the city's street traffic continually flows. Furthermore, if there is power to dedicate the right of

way to highway purposes through Railroad Addition, there is power to dedicate it for such purposes through the City of Spokane, through the State of Washington, throughout the length and breadth of the Northern Pacific system. Likewise, if there is power to give for such use, there is power to take for such use. If the protection of the Federal grant is removed, the state stands supreme, and if it has said, or if it chooses to say, that highway use is superior to railway use, then it may take the right of way for highway purposes, no matter what the effect of the taking upon its use for railway purposes. The State of Washington is seeking a practicable route for a highway from Puget Sound to the eastern part of the state, one which may be constructed without inhibitory cost and which may be kept open across the Cascade Mountains during the winter. If it is within the power of the Northern Pacific to dedicate its right of way for highway purposes, why may not the state condemn the right to use it for such purposes from Seattle and Tacoma to Spokane, thus securing the benefits of the easy grades, its tunnels through the mountains, its bridges across the Columbia and other large rivers? If the joint use of the right of way for railroad, pedestrian and general vehicle travel is

feasible and permissible through the center of the City of Spokane, it is feasible and permissible at any point or all along the line.

There is nothing forced or fanciful in these suggestions. If there is power to give the right of way anywhere for highway purposes, there is power to give it everywhere. If there is power to give for such purposes, there is power in the state to take therefor. Whether given or taken, that which is devoted to highway uses may be used as any highway may be used. Railroad use, especially the use necessitated by the operation of a great transcontinental line, is incompatible with highway use, and here as on every other street and road railroad use must be subordinated to highway use. Not only must the city or county be free to regulate the railroad use so the highway use will be safe, but it must be free to improve the highway as highway needs seem to require. Surely no reasonable person will doubt that in the surrender of dominion and control over the right of way which necessarily results from its dedication to highway purposes, there lie vastly greater possibilities of its destruction for railway use, and consequently vastly greater likelihood of the thwarting of Congressional purpose, than would exist in permitting some chance

farmer here and there to acquire an insignificant strip of the right of way for the cultivation of his crops.

We wish to emphasize if we may by repetition, our insistence that there is no sound ground for distinguishing the case at bar from the *Townsend Case.* Congress, it is said in the *Townsend Case,* gave a right of way to the Northern Pacific Railroad Company, and made it a vast aid grant, on condition that it would build and operate a railroad upon the right of way. To ensure the performance of the obligations assumed, it put it beyond the power of the company to divert the right of way from railroad use. The purpose of Congress, it is there declared, was to secure the construction and continued operation of a vast railroad system, and it forbade any act in connection with its right of way grant which might tend to thwart the purpose. If the possession by a farmer of a small strip of the right of way, a strip never used and which would probably never be needed for railroad purposes, would have such tendency, then surely the giving over of the whole right of way, main tracks, second tracks, sidings, switches and all, to street use will have such tendency. To say that one act is forbidden and the other not because the right in one case is

private and in the other public is not to deal with the matter sensibly. Congress had one purpose; that the operation of the railroad on the right of way it had given for railroad use should not be interfered with by the grantee disposing of the right of way as it chose. It could make no difference to Congress whether the operation of the railroad was interfered with by a farmer cultivating the right of way, or by a city laying sewers in or putting electric light poles upon it. Undoubtedly, as an abstract legal proposition, public use is superior to private use, and much is permitted to public use which is forbidden to private use. But "public use" is no shibboleth to rule this case and remove it from the operation of the *Townsend Case*. To determine whether this case is ruled by the *Townsend Case* we must look to the Congressional intent as declared in that case, and from that decide whether in the use sought to be established here there is aught which might tend to defeat that intent. It is the effect of the use upon the use for which Congress granted the right of way which is decisive of whether it is permissible, and that effect is not ascertained by saying the use sought to be upheld is a public use. The occupation of the right of way for a public park, a public playground, school

grounds, a city market, or any other of a hundred and one conceivable municipal uses, is as much an occupation for a public use as would be its occupation for street purposes. But would any reasonable person urge that such occupation was permissible notwithstanding the *Townsend Case,* because, and only because, it was for a public use? The absurdity of such a claim would be patent, yet the present claim is distinguishable from it only in degree, if at all. What with street travel crossing the tracks at the numerous intersecting street crossings at grade, what with street travel to and fro along the right of way, what with municipal improvement of the right of way for street purposes and municipal regulation of railroad operation thereon so that all forms of street use might be made of it, the company might as well have turned over the right of way for a public park, playground, or market, so far as any possible use of it for railroad purposes is concerned. Since that was the use for which Congress granted it, we hardly see how the effect of its destruction for such use may be disguised by saying that the use which destroyed it was a public use.

Proceeding along a line of thought akin to, and fallacious as, that by which the *Townsend Case*

was sought to be distinguished, counsel claim comfort from that case and from *N. P. R. Co. v. Spokane* on the theory that there is no distinction between making use of the right of way for street crossings and giving it over longitudinally to street use. They urge that "The necessities of a municipality will always require" street crossings, and that "they may often imperatively require" the use of a railroad right of way longitudinally for street purposes. So from the acknowledged power of the company to give, and of the city to take, the right to cross the right of way with streets, the same power of donation and acquisition is attempted to be deduced as to longitudinal occupation of the right of way for street purposes.

The fact stated, *i. e.,* that the necessities of a municipality will often "imperatively require" the use of a railroad right of way for street purposes, is not true. Municipal needs never require the seizure of railroad right of way for street use. The authorities next cited show that municipalities have often thought it was imperative that they should take railroad right of way for street use, but they have never been able to persuade the courts to concur in their opinion. The distinction from the standpoint of necessity alone

between crossing a railroad right of way and occupying it longitudinally with a street is too palpable to permit remark. It is as easy to parallel a railroad right of way with a street as to occupy it, while there is but one way to cross it. However, the question is not to be solved by reference to the needs of the municipality alone. The intent of Congress, which not only created the Northern Pacific Railroad Company and the Northern Pacific right of way, but Washington Territory and Spokane Falls as well, is the decisive factor in determining the power of the one to give and of the other to take the right of way for a street. This court in *N. P. R. Co. v. Spokane,* and the Supreme Court in the *Townsend Case,* have said that Congress contemplated the necessity for highway crossings across this right of way extending from Lake Superior to Puget Sound, and that such might be donated or taken. But the right to donate or take was indicated in those cases to be limited by strict necessity, and then to such cession or taking as would not destroy the railroad use. The railroad company "might not divert the granted strip to other and foreign uses, and might not cede to the public rights and easements so extensive or of such a nature as to interfere with its duties to regularly

and properly operate a railroad." The public easement to cross the right of way "is undoubtedly subservient to the exigencies of railroad use, and the public take the dedicated crossing subject to the inconveniences which may result from the increase of traffic and transportation along the line of the road, and the possible necessity of laying more tracks thereupon." A railroad company may "in recognition of public interests, and for the promotion of the public welfare, dedicate to the public an easement over its right of way which does not interfere with its own use of the same for a railroad." *N. P. R. Co. v. Spokane.* Congressional intent, then, is the controlling factor, and while on one hand it is plain that Congress did not intend to build a Chinese wall across the continent from Lake Superior to Puget Sound, shutting off highway travel between the sections it separates, it is on the other hand equally plain that it did not intend that the right of way it gave for railroad use, in order that a great railroad system might be built and operated thereover, should be diverted from such use and devoted to highway purposes by every little municipality through which the line passed. Most carefully did this court throughout the opinion above referred to point the distinction. And even had it

not; even if there were no controlling authority to rule the case, it would be a more than usually bold or undiscerning man who would attempt to assimilate the need and the power to cross a railroad right of way with a street to the need and the power to take a railroad right of way for a street. Over and over again have the courts held that though it may be in the power of the state to take property devoted to one public use and divert it to another public use, the exercise of such power will not be presumed to be intended, but must be declared in unequivocal language. It is uniformly held, therefore, that from mere authority to open streets and condemn land therefor the power to lay out a street longitudinally upon a railroad right of way will not be inferred, though it is ample to confer power to open a street across such right of way; the distinction being that to lay out a street along a right of way is necessarily to take the land from railroad use and devote it to highway use, while the other is simply to use the right of way for crossing purposes in ordinary fashion, the which is neither destructive to nor seriously affects its use for railroad purposes.

> "The distinction between the crossing of a highway or the track of a railroad, and the occupation of the road-bed, which in its nature must necessarily be exclusive, is recognized in

the cases cited. Under a condemnation of a right to cross, nothing will be acquired but a mere right of way, and the place of crossing will remain in common use of the parties for the exercise of their several franchises. The condemnation, under such circumstances, will leave the franchise unimpaired. *State, The Easton and Amboy R. R. Co., pros., v. The National R. R. Co.,* 7 Vroom 181. A right affecting so slightly the exercise of the franchises of another corporation may be deduced from a mere grant of the power of condemnation.

But where the use for which the condemnation is prosecuted is of such a character as necessarily to require for its enjoyment the exclusive possession and occupation of the premises, it is manifest the condemnation will be utterly futile, unless it may operate also to extinguish the right of the corporation whose title is condemned to use the lands for its corporate purposes. A condemnation that will accomplish this result will destroy, *pro tanto,* the franchises of the corporation, and impair, to that extent, the powers granted by the legislature. Especially will that be the case where the land has been improved and applied to the designated use by making a roadway or the construction of tracks and improvements upon it. Still more obviously will the legislative intent be defeated where priority of location confers priority of right. The power to invade the privileges of a corporation in such manner will not be inferred from a naked grant of the power to condemn. It can only be derived from a power granted either in express terms or arising by a necessary implication; and the legislative intent to authorize such an interference with the rights and privileges of another corporation—whichever way

it may be manifested—must be plainly perceived."

Railroad Company vs. Commissioners, 39 N. J. L., 28, 33.

"It is obvious, therefore, that the ultimate question in this case is whether the statute authorizing municipal corporations to appropriate lands for streets confers power to seize land occupied and used by a railroad company. That it does not is affirmed in the well-considered case of *City of Valparaiso vs. Railway Co.,* 123 Ind. 467, 24 N. E. Rep. 249. The decision in that case is well supported by authority. It is suggested that there is a distinction between this case and the case of *City of Valparaiso vs. Railway Co., supra,* inasmuch as the opening and construction of a street does not destroy the railroad. But there is no ground upon which a distinction can be made. If the city has authority to establish a street the rights of the railroad company may be radically changed. If the land is taken by the city the highway ceases to be a railroad, and becomes a street. The authority over it, and the responsibility of maintaining it, would, in that event, pass from the private corporation, and vest in the municipality. *Railway Co. vs. Phillips,* 112 Ind. 59, 13 N. E. Rep. 132. It is true that a railroad may exist in a street, but the highway when it becomes a street essentially changes its character; losing, indeed, one character and taking on another. Not only so, but more, for if the authority to appropriate the land exists, it empowers the municipality to entirely exclude the railroad company from the occupancy of the street. There is nothing in the statute warranting the assumption that a municipal corporation may seize property for a street, and yet suffer it to continue to

be part of a continuous line of railroad."

Seymour vs. Jeffersonville, etc., Co. (Ind.) 26 N. E., 188.

The accentuation by Judge Elliott (whose opinions upon such a subject ought to be accepted as authority) in the above opinion of the point which rules this case, *viz.,* that a railroad right of way which is taken for highway purposes ceases to be a railroad and becomes a street, seems worthy of remark.

"Again, under the great weight of authority, neither the defendants nor the county commissioners of Wyandotte county could open or construct a public highway parallel with the track of the railway on the right of way granted by congress. Pierce, R. R. 155, states the law as follows: 'Thus, if a railroad is authorized between certain points, and if necessarily, or in the usual and convenient course, it will cross highways or other railroads, it may be laid across them, even without any express reference to them in the authority. Such crossing, being necessary to the enjoyment of the second grant, and not essentially impairing the first, is presumed to be authorized. But, on the other hand, the right to take exclusively the location made under the first grant, or any part of it, or to lay tracks longitudinally for a considerable distance upon it, ought to be expressly conferred or implied only where otherwise effect could not be given to the second grant.' Mills, Em. Dom. §46, says: 'Under a general authority to condemn lands for streets, a street may be laid out across a railroad, but not longitudinally on the railroad

track. Under general laws, property cannot be taken, where the appropriation will destroy or impair the exercise of the franchises of another corporation, unless the power to take is given in express terms, or arises from a necessary implication. The right to lay a street across a railroad track arises from a necessary implication.' Lewis, Em. Dom., also says: 'A general authority to lay out highways and streets is sufficient to authorize a lay-out across the right of way of a railroad. * * * * An authority to lay out a highway across the track of a railroad company is authority to cross all the tracks at any place. But under a general authority to lay out highways a part of the right of way of a railroad cannot be taken longitudinally; nor can the way be laid through depot grounds, shops, and the like, which are devoted to special uses in connection with the road, and necessary to its operation, and in constant use in connection therewith.' Section 266."

U. P. R. Co. vs. Kindred (Kan.), 23 Pac., 112.

Other authorities to the same effect are:

1 *Elliott, Roads & Streets* (3rd Ed), §§245, 247.

2 *Lewis, Eminent Domain* (3rd Ed), §417.

Fort Wayne vs. Ry. Co., 32 N. E., 215.

Railway Co. vs. Hartland, 88 N. W., 423.

Railway Co. vs. Johnston, 49 S. E., 496.

Bridgeport vs. Railway Co., 36 Conn., 255.

Turnpike Co. vs. Middlesex, 10 Pick., 270.

With one exception, the *Kindred Case,* the rights of way involved in the above cases were those of

state chartered railroads, whose rights of way were acquired by condemnation or purchase. They are not, therefore, authority as to the possible power of the state to authorize a condemnation of the Northern Pacific right of way, and are not cited by us as such. They are cited merely to show the universal recognition by the courts that the laying out of a street longitudinally upon a railroad right of way and tracks is to destroy them for railway uses. The gist of those decisions is this:

The title to land acquired for right of way purposes by a state chartered railroad, under a state grant of authority to purchase and condemn, has no higher source than the title acquired by a municipality under state granted authority to open streets and condemn land therefor. Both have the same source, the state. Both, too, in the absence of explicit legislative declaration to the contrary, are for an equal, though different, public use. The opening of a street longitudinally upon a railroad right of way and tracks necessarily destroys the railway use and converts the land into a street. As put by Judge Elliott in the *Seymour Case*: "If the land is taken by the city, the highway ceases to be a railroad, and becomes a street," whereupon the authority over it and responsibility for maintaining it "pass from the private corpora-

tion and vest in the municipality." This, consequently, is to divert land already devoted to one public use to an entirely different public use, a thing which, while permissible when the state is the source of the right of both railroad and municipality to take and hold land if the legislature explicitly so provides, will not be considered authorized by mere legislative authorization to municipalities to open streets and condemn land therefor.

The state, of course, cannot authorize the condemnation of a right of way which Congress has granted for one public use in order that it may be devoted to another public use, and in so far as the above authorities recognize the latent power of the state to so act with respect to rights of way acquired by purchase or condemnation under state authority they are inapplicable here. They are strictly applicable, however, upon the point decided in them, *viz.,* that the opening of a street longitudinally upon a railroad right of way is to convert it from a railroad into a street, and necessarily diverts it from railroad use. This is all that need be established here to warrant the declaration that the attempted dedication of the Northern Pacific right of way as a street was beyond the power of the company.

Counsel say the foregoing decisions were based

upon state policy and intimate that no such policy prevails in the state of Washington. The contrary is true. While there has never been in the state of Washington any attempt by a municipality to take a railroad right of way for street purposes, analogous attempts have been made by one railway company upon another. In *Seattle, etc., Co. v. State of Washington,* 7 Wash., 150, it was held that a statute which gave to a railroad company "the power to cross, intersect, join, and unite its railway with any other railway before constructed at any point in its route and upon the grounds of such other railway company" did not confer power upon one railway company to cross the tracks of another railway company in such fashion that there would be in effect a longitudinal taking of the tracks for some little distance. In that case for a distance of more than 400 feet it would have been impracticable to operate one set of tracks while the other was in actual use, and this, the court held, amounted to a longitudinal taking. See also *State ex rel Ry. Co. v. Superior Court,* 45 Wash., 270, where it was held that one railway company could not cross the yards of another railway company when to do so would seriously interfere with the business of the prior company. It will be seen by these decisions that if the question

is to turn upon the matter of state policy, it turns in favor of the defendant's contention.

It is said that "the right to dedicate streets in rights of way" "is quite a different thing from the right to condemn," and in other portions of the brief it is intimated that the power of dedication is a wider power than that of condemnation.

On the surface that may or may not be true generally. Whether it is depends upon the governing statutes. The two powers, however, are in principle equal and co-extensive.

Where the state is the source of the power of a railroad company to take, hold and use land for railway purposes, the state may measure that power as it will. The state which declares that the taking of land for railroad purposes is a taking for a public use, and so permits it, may declare that there are other and higher public uses, and permit the land taken for railroad use to be taken for such other use as it may declare superior. But, as we have seen above, there must be an explicit declaration to that effect or it will not be permitted. Based upon the same principle, the state, where it is the source of power may permit a railroad company which has taken land for and devoted it to a public use, to abandon that use and give up the land. But

here again it will not be presumed that the state intended that a quasi public corporation like a railroad company should disable itself to serve the public, and there must be power explicitly conferred upon a railroad company to dispose of its land which is devoted to the public service. So while it is "ordinarily true" that a private corporation may make a dedication of land, the power is limited by this, that the dedication "does not interfere with the purposes for which the company was incorporated." 1 *Elliott, Roads & Streets* (3rd Ed) § 161. Speaking of decisions recognizing the power of a railroad company to release or convey a portion of its right of way so that a private right of way or a highway might be acquired thereover, it was said:

> "The doctrine above stated, under our statutes and the general principles of law, should be received, we think, with an important limitation. Railroad companies are allowed to acquire rights of way by condemnation because of the interest the public has in the construction and operation of their roads as highways, and hence a right of way so acquired is burdened with duties to the public. Therefore it may be stated as a general proposition, while the railroad company may deal with the right of way so acquired as its own in the conduct of its business as a carrier, it cannot dispose of it or use it so as to destroy or impair its ability to serve the public. 5 *Thompson on Corporations,* §§5878, 6137; *Thomas v. R. R.*

Co., 101 U. S. 87, 25 L. Ed. 950; *Ry. Co. vs. Hyatt* (Cal.), 64 Pac. 272, 54 L. R. A. 522; *Collett vs. Com'rs.* (Ind. Sup.), 21 N. E. 329, 4 L. R. A. 321; *R. R. Co. vs. Spokane,* 64 Fed. 506, 12 C. C. A. 246.

Matthews vs. Railway Company, 46 S. E. 335.

The power to take land devoted to a public use and divert it to another public use, and the power of a quasi public corporation voluntarily to divert land devoted to a public use to another public use, spring, then, from the same source, the state, and ordinarily the two are in all respects identical. They are here. When the so-called dedication was made, the present state of Washington was a territory, deriving all the powers it had from Congress. When Congress chartered the Northern Pacific Railroad Company, authorized it to build a railroad across the public domain, and gave it a right of way for that purpose, it impliedly denied to one of its creations, the Northern Pacific Railroad Company, the power voluntarily to divert any of the right of way to any other use than that for which it was granted, and by equal implication denied to its other creation, the Territory of Washington, the power to divert the right of way to an alien use against the will of the railroad company.

If Congress neither directly nor indirectly authorized its creatures, the Territory of Washington

and the Village of Spokane Falls, to condemn the right of way of its creature, the Railroad Company, and if without such authority the territory or the village could not condemn the right of way in question, then how could these two creatures of Congress, by putting their heads together, through the guise of a dedication by the company and the implied, or for that matter express acceptance by the village, effectuate something which the one could not do the other objecting? The right of the railroad company to object had the village endeavored to condemn rested upon the public policy of the Congressional grant to it. Certainly that public policy is as potent, the village and the railroad agreeing, as it would have been the village and the railroad disagreeing. Neither the convenience of the village nor the inconvenience to the railroad company would have been the controlling factors in determining the right in litigation, but Congressional policy. The railroad and the village agreeing could not affect that policy. Their respective private rights, conveniences and inconveniences might have been determined by agreement, but the public policy of their common creator and master, the Congress of the United States, could not be affected by their agreement.

There is here, then, no difference between the

right to dedicate and the right to condemn. In degree as well as in kind they are alike.

The power of dedication has so far been considered in the light of limitations of the Congressional grant of the Northern Pacific right of way. No different result will be reached if those limitations are disregarded, and the right of way is regarded as being held upon the same tenure as that upon which any railroad right of way, however acquired, is held. Neither will it be if we take the decisions which complainants' counsel cite in their aid as the text for our argument.

A nation wide policy, declared in the decisions of every court in the land, forbids railroad companies doing any act which will destroy or impair their power to serve the public unless under competent legislative sanction. No legislative sanction can be found for any railroad company within the State of Washington dedicating its right of way longitudinally for street purposes. No authority and no evidence but common sense is needed to demonstrate that such a dedication if covering the entire right of way is destructive to, or at the least must seriously impair, the power to serve the public.

In the case at bar, Railroad Street, with its width of 225 feet, covers every track used by the Northern Pacific in handling its transcontinental and local traffic through and into Spokane, and in serving a large portion of the wholesale business of the city. If it is a street, it is open to all forms of street travel, and the City of Spokane may authorize street car operation upon it, and use it for all other urban street purposes; for sewers, water and gas pipes, telephone, telegraph and electric light poles or conduits. Transcontinental, local, and switching trains must adapt their movements to all these street uses. The city, too, may regulate the movement of the railroad traffic in the many ways which are permissible under the police power when a railroad is permitted to maintain its tracks in a street; even to forbid the use of steam locomotives thereon (96 U. S. 521; 227 U. S. 559), or to cut down the trackage to a single track (166 U. S. 673). Complainants' counsel do not question this, saying (brief, p. 67) that the reservation of the right to use Railroad Street for railroad purposes "cannot be construed to mean any use to which the Company may see fit to put the street," but only such as is "consistent with the maintenance of the street as a street," and that the use should be (p. 69) "confined to the tracks shown on the town

plat," i. e., the main track and two sidings, about 700 feet in length, extending between Monroe and Post streets.

So far as the Northern Pacific service is concerned, then, Spokane must turn back from the present day city of 125,000 people to the little frontier village of 1881. It must take a position inferior to that of any siding, flag or water station on the Northern Pacific system, for no present day transcontinental passenger train, not to speak of the half mile or longer freight trains now so common, could stand on one of the short sidings shown on the plat. The constantly increasing traffic of the Northern Pacific has made double tracks necessary through all the larger towns on its line and for a goodly number of miles on each side their limits; not for switching purposes, but that the trains being run over the line may not be unduly delayed. Through the City of Spokane, and for many miles on either side of it, the line is double tracked. If complainants are sound in their contentions, all this work must come out through the heart of the city, and the trackage of the road reduced to a single track with two little inutile sidings, and even this must be used under the thousand embarrassments, harassments and hamperings which render the practical operation of a steam

railroad over a city street impossible.

The decisions upon which complainants' counsel most rely to establish the power of a railroad company to so deal with its right of way as to bring about such a result forbid it. They were cases where one railway company had granted another railway company the right to use its tracks for railway purposes, the grant being surrounded by such limitations upon the use as to retain the control of the tracks in the grantor company and prevent any undue hampering of its operations. Subsequently the grantor company sought to avoid the grant, not because its operations were hampered by the use granted to the other company, but because it feared that at some time in the future they might be. A fundamental and radical distinction between the cited cases and the case at bar is apparent in the mere statement. In the cited cases, the tracks were not granted for a different use, nor did the grantor surrender its dominion and control over them. Here both such conditions would be present should the dedication be upheld to the extent for which complainants contend. This patent distinction was in the mind of the great judges from whom counsel quote. Said Judge Brewer concerning the contract there claimed to be *ultra vires* in a part of his opinion which counsel

did not quote:

> "It clearly will not operate at present to disable the Pacific from discharging its duties. While the Rock Island is let into possession and use, the Pacific is not put out of possession and use. There is no surrender of the exclusive use of any portion of the Pacific's Line. It remains in the undisturbed possession of every mile of its track; can operate all its trains, and discharge all the duties which it owes to the government or the public." *A different question would arise if it had attempted by this instrument to dispose of the full possession of the same length of its track.*
>
> (The italics are ours.)
>
> *Chicago, etc., Co. v. U. P. R. Co.,* 47 Fed., 23.

And again:

> "In the case at bar, as we have seen, the contract is not one for the dispossession of the Pacific Company from the use of its tracks or other facilities. It is not one disabling it from discharging its duties. It is simply one to coin into money, for its benefit, the surplus use of a part of its property. Can it be that such a contract is beyond the powers implied by the grant? Concede that, under the power to lay out, construct, and operate a railroad, it is not authorized to build tracks for the purposes of sale or lease, but when discharging its duties it builds tracks for its own use, and uses them, if all the use it can make is limited, and there be a large amount of surplus use, upon what reason can it be adjudged that that surplus use must necessarily lie idle? It is a thing of value. It may be, as it is done by this contract, coined into money. What right or

interest of the government or public is prejudiced thereby? If a railroad company builds a depot which is larger than its present needs require, may it not rent one room, and receive profit therefrom? Or must it, because it is not authorized to build buildings for rent, let that room remain vacant until the increase of its business requires its use? The Pacific Company may not build tracks for the purpose of leasing them, but it must have at least one track for the passage of its own trains. If its trains do not fully use that track, as in this case they do not, it has a surplus of use, which is of value, and which it may make profit out of in any manner not inconsistent with its duties to the public and its obligations to the government. I think it may be laid down as a general proposition that a corporation which, in its discharge of the duties imposed by its charter, acquires property which it must have for its own uses, may, if there be a surplus use of such property, make a contract for the disposition of such surplus use in any manner not inconsistent with the purposes of its creation. So I conclude that neither of the three objections is well taken, and hold that the contract is not *ultra vires.*"

Of this same case it was said in the Supreme Court in the outset of the opinion:

"The general rule is that a contract by which a railroad company renders itself incapable of performing its duties to the public or attempts to absolve itself from those obligations without the consent of the State, or a contract made by a corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced, or rendered enforceable by the application of the doctrine of estoppel. *Thomas v. Railroad Co.,* 101 U. S.

71; *Central Transportation Co. v. Pullman Car Co.,* 139 U. S. 24.

U. P. R. Co. v. Chicago, etc., Co., 163 U. S. 581.

The court thereupon entered upon a consideration of Congressional legislation with respect to railroad development in the west, from which was deduced a "great policy in favor of continuous lines" and found "effectuation of that policy" in such contracts as that under consideration. Then:

> "We are of opinion that it was within the powers of the Pacific Company to enter into contracts for running arrangements, including the use of its tracks, and the connections and accommodations provided for, and we cannot perceive that this particular contract was open to the objection that it disabled the Pacific Company from discharging its duties to the public. By the contract the Pacific Company parted with no franchise, and was not excluded from any part of its property or the full enjoyment of it. What it agreed to do was to let the Rock Island into such use of the bridge and tracks as it did not need for its own purposes. This did not alien any property or right necessary to the discharge of its public obligations and duties, but simply widened the extent of the use of its property for the same purposes for which that property was acquired, to its own profit so far as that use was concerned, and in the furtherance of the demands of a wise public policy. If, by so doing, it may have assisted a competitor, it does not lie in its mouth to urge that as rendering its contract illegal as opposed to public policy. Ability to

> perform its own immediate duties to the public is the limitation on its *jus disponendi* we are considering, and that limitation had no application to such a use as that in question."

These cases, surely, are more than negative authority against the power of dedication which complainants here seek to uphold. They sustain a contract by which a railroad "widened the extent of the use of its property for the same purposes for which that property was acquired" while not surrendering its dominion over such property or interfering with its ability to duly serve the public, but by more than necessary implication deny the validity of a contract by which a railroad company should attempt to wholly surrender dominion over its property which is devoted to a public use and give it over to another and paramount use which, though public in its nature, was wholly different in character from the use for which the property was acquired; not only different in character, but utterly incompatible with the use to which it was first devoted. All these conditions are present in an attempt to dedicate the right of way of a great transcontinental railroad through the heart of a large city to street uses, else reason and authority have lost their sway.

We submit, therefore, that whether judged from the standpoint of the purpose and implied limita-

tions of the Congressional grant, or from that of the general policy governing all railroads, the dedication sought to be upheld must fall.

It is insisted that the question of the power of the Northern Pacific Railroad Company to dedicate its right of way to street uses must be determined in the light of conditions as they were in 1881, and not as they were in 1913, and that as the company could have handled all the business it had to take care of in 1881 through and in the village of Spokane Falls, notwithstanding the dedication, conditions as they are at the present time will not be considered to invalidate the dedication.

If the limitations upon the Northern Pacific right of way grant are as we claim them to be, it certainly makes no difference which period is held to be the proper one from which to study the question of power of dedication. As we have before stated, Railroad Street covered the center of the right of way, and the main track of the road was in the center of the street, in 1881 as well as in 1913. Unless all the authorities we have heretofore referred to grossly err, the dedication of a railroad right of way to street uses is to divert it to another and foreign use; a thing it was utterly beyond the

power of the Northern Pacific Railroad Company to do with its right of way, no matter when attempted or what the conditions were when it was attempted. But if complainants' theory is sound, and the railway company could make any disposition it chose of its right of way within the limit of its power to properly serve the public, it makes a great deal of difference whether 1881 or 1913 is fixed as the time from which to determine the validity of the dedication. And if we must accept complainants' theory as sound that the power to dedicate must be measured by the ability of the company to discharge its public duties, it is manifest that present day conditions must be regarded.

When the dedication was made, and for years afterward, Spokane Falls was a village, chiefly existing upon paper. People traveled around over vacant land, whether streets, lots, or railroad right of way, as their convenience dictated. As the village grew to a town and from town to city, and streets were graded and improved, travel began to follow the lines of the streets. During that period of growth, the business of the railroad company grew. As more track room was needed, additional tracks were laid, without let or hindrance from any one. Wholesale houses, even, great brick buildings, were built in what is now claimed to be

Railroad Street, under license from the company. The street, in a word, was never used or improved as a street, the city never exercised or attempted to exercise any authority over it as a street, and the company used it as its private property just as it did any other part of its right of way. The so-called dedication, then, was a mere paper dedication, which in no way interfered with the actual occupation and use of the dedicated strip by the company as it chose. A dedication was first claimed, and the railway company's dominion over the dedicated strip was first sought to be interfered with, when this suit was brought. Now if, as claimed by complainants, the power to dedicate must be measured by the railway company's need to use, the need must be determined when first the courts are called upon to declare the dedicatory power. It were too absurd to look back to the conditions in 1881 and say the needs of the company were then so small the dedication would have been upheld had it been called in question, consequently such conditions must govern in determining the power now, when for the first time its measure must be ascertained.

And this brings us naturally to another of complainants' contentions. In the *Chicago & Rock Island-Union Pacific* case, Judge Brewer on circuit

(47 Fed. 16), and the Supreme Court when the case reached it (163 U. S. 564), said that if the contract which was there upheld under the existing conditions should, because of changed conditions, impair the ability of the grantor railroad company to properly serve the public, a court of equity could grant relief, even to the extent of abrogation of the contract. Counsel recognize that the principle there declared would justify refusing effect to a dedication such as that in question in a proper case, but say no such case is here presented because the railway company has not come into equity seeking relief and as a condition thereto offering to do equity.

Counsel seem to forget what their clients' complaint is and what the relief they seek. They complain that a dedication was made which the dedicator has denied, and that the City of Spokane, the representative of the public for the purpose of accepting the dedication and making use of the dedicated strip, has not merely acquiesced in the denial but has actively aided and abetted the diversion of such strip from the purposes for which it was dedicated by the adoption of an ordinance which, if acted on, will render it impossible, finally and irretrievably, to use the strip for street purposes. The relief prayed is, in effect, specific

performance of the dedicatory contract through the medium of enjoining the use of the dedicated strip for other than street purposes. Now we had supposed that it was fairly well settled that a plaintiff could not obtain equitable relief unless he made a case therefor measured by equitable principles, and that a court of equity would never enforce a contract which was unconscionable or opposed to public policy. Whatever the dedicatory contract might have been in 1881, it is beyond peradventure that to give effect to it now to the extent claimed by complainants, or at all, would be both unconscionable and contrary to public policy. If, as complainants urge, the railroad officials did not foresee the wondrous growth of this country, and supposed the little frontier village of Spokane Falls would always remain what it then was, is there in such ignorance, or at least sad want of foresight, cause to move a court of equity to specifically enforce a contract they would not have made had they dreamed of present day conditions, and the enforcement of which now must be so disastrous? More. The dedication was made without thought, say complainants, that the right of way would ever be needed for railway purposes. But it is needed, and sadly needed, for such purposes now, and to specifically enforce the dedicatory contract will

greatly impair, if not destroy, the ability of the railway company to discharge its public functions. This, say the courts, is contrary to public policy. Since when have courts of equity been willing to enforce a contract when to do so is to run counter to public policy?

> "But whether this contract be absolutely void as contravening public policy or not, we are clearly of the opinion that it does not belong to that class of contracts, the specific performance of which a court of equity can be called upon to enforce. To stay the arm of a court of equity from enforcing a contract it is by no means necessary to prove that it is invalid; from time to time immemorial it has been the recognized duty of such courts to exercise a discretion; to refuse their aid in the enforcement of unconscionable, oppressive or iniquitous contracts; and to turn the party claiming the benefit of such contract over to a court of law. This distinction was recognized by this court in *Cathcart v. Robinson,* 5 Pet. 264, 276, wherein Chief Justice Marshall says: 'The difference between that degree of unfairness which will induce a court of equity to interfere actively by setting aside a contract, and that which will induce a court to withhold its aid, is well settled. 10 Ves. 292; 2 Coxe's Cases in Chancery, 77. It is said that the plaintiff must come into court with clean hands, and that a defendant may resist a bill for specific performance, by showing that under the circumstances the plaintiff is not entitled to the relief he asks. Omission or mistake in the agreement, or that it is unconscientious or unreasonable, or that there has been concealment, misrepresentation or any unfairness, are enumerated

among the causes which will induce the court to refuse its aid.' This principle is reasserted in *Hennessy v. Woolworth,* 128 U. S. 438, 442, in which it was said that specific performance is not of absolute right, but one which rests entirely in judicial discretion, exercised, it is true, according to the settled principles of equity, and not arbitrarily or capriciously, and always with reference to the facts of the particular case. Willard v. Taylor, 8 Wall. 557, 567; Marble Co. v. Ripley, 10 Wall. 339, 357; 1 Story's Eq. Jur. sec. 742; Seymour v. Delancey, 6 Johns. Ch. 222, 224; White v. Damon, 7 Ves. 30, 35; Radcliffe v. Warrington 12 Ves., 326, 331."

Pope Mfg. Co. v. Gormully, 144 U. S., 225, 236.

We think if counsel had recurred to fundamental principles a little more frequently while writing their brief, they would not have assumed so many impossible positions.

The only authorities cited by complainant which in any way militate against the construction we claim must be placed upon the Northern Pacific right of way grant are *North C. R. Co. v. N. P. R. Co.,* 48 Wash., 529, and *U. P. R. Co. v. Greeley,* 189 Fed., 12. We are relieved from the burden of critically examining these cases by the consideration that whatever might be the effect of these decisions if they were accepted as authoritative upon the

abstract question of the power of the Northern Pacific to deal with its right of way, they do not affect the ultimate question presented here. The Washington case, which permitted another railroad company to take for its right of way an unused and unneeded strip from the Northern Pacific right of way, was decided in accordance with the state policy which permits one public service corporation to take for necessary public uses the property of another public service corporation which is not devoted to or needed for the public service. The court thought there was not in the Federal grant any denial of "the power of the state to determine whether the whole of a right of way * * is actually needed as against the requirements of the public service which arise with the increase of commerce and transportation necessities." The *Greeley Case* was like in character. Strips of a 400 foot right of way granted by Congress which had never been used and it seemed would never be needed for railroad purposes, were acquired by a city and another railroad company for street and for railroad uses. Such acquirement was upheld upon the ground that it was acquired "for public and not for private use"; that the portion "which encroaches upon complainant's alleged right of way is not now required by the complainant, and, so

far as is disclosed by the evidence, will not be necessary in the near future, to enable complainant to fully and freely discharge its duties to the public"; and, therefore, complainant was estopped "from *now* claiming" as against the other parties "that it is entitled to the *present* possession of the *entire* 400 foot right of way" (our italics). The intimation contained in the words above quoted seems to range this case with the *Chicago & Rock Island-Union Pacific Cases* referred to heretofore, in which event it is probably not so open to criticism as it would otherwise be. However, it is of no authority here. We have here no case of a strip of right of way never used or needed, and which probably never will be needed or used for railroad purposes, being diverted to another use. Along the center of its 400 foot right of way, the Northern Pacific Railroad Company marked out a strip 225 feet wide which it called Railroad Street. It platted and sold its right of way on either side of this strip, and though such action would have been vain had not Congress seen fit to ratify it, Congress did see fit to ratify it by the validating act of 1904. It has nothing left for its right of way through Spokane but this strip. In the center of it lies, and always has lain, the main track of its road. That track is now doubled, and in addition it now

has on the strip in controversy the secondary tracks, side tracks and switch tracks which the vastly increased and ever increasing traffic of the railroad company requires. So much has the railroad traffic along the right of way, and the street traffic across it at the intersecting streets, increased that the city (its action, we may concede, jumping with the wishes of the railroad company) has ordered a separation of grades by the filling in of the right of way so as to carry the tracks across the intersecting streets above their levels. If Railroad Street is a street, not only may not this separation of grades be made and the dangers resulting from crossing streams of railroad travel and street travel at grade so be eliminated, but Railroad Street must be thrown open throughout its length and breadth to urban street travel of every kind, urban street use of every sort, and urban street regulation of every character. That to do so is to render the operation of the Northern Pacific railroad along it impossible is too patent for argument. Remove the warehouses if you please, restrict switching operations to the minimum possible in order to adequately serve the business which must be served in a city the size of Spokane, and yet it would be impossible to handle the traffic, freight and passenger, through, into and out of Spokane, over such a line as the Northern

Pacific in a city street. The case, then, is no more ruled by the *North Coast* and *Greeley Cases* than it is by the *Chicago & Rock Island-Union Pacific Cases*. None permits, and each by more than implication forbids, the diverting of a railroad right of way to any use, no matter what its character, which impairs the railroad use.

III.

Statutory Dedication.

The laws of Washington Territory, Code of 1881, governing the platting of townsites and additions, and the dedication of streets thereover, in effect at the time Railroad Addition was platted, read as follows:

> "Any person or persons, who may hereafter lay off any town within this territory, shall, previous to the sale of any lots within such town, cause to be recorded in the recorder's office of the county wherein the same may lie, a plat of said town, with the public grounds (if any there be), streets, lanes and alleys, with their respective widths properly marked, and the lots regularly numbered, and the size stated on said plat.
>
> "Every donation or grant to the public, or to any individual or individuals, religious society or societies, or to any corporation or body politic, marked or noted as such on the plat of the town, or wherein such donation or grant may have been made, shall be considered, to all intents and purposes, as a quit claim deed

to the said donee or donees, grantee or grantees, for his, her or their use, for the purposes intended by the donor or donors, grantor or grantors, as aforesaid.

"Every person hereinafter laying off any lots in addition to any town, shall, previous to the sale of such lots, have the same recorded under the like regulations as are provided for recording the original plat of said town, and thereafter the same shall be considered an addition thereto.

"Every person whose duty it may be to comply with the foregoing regulations shall, at or before the time of offering such plat for record, acknowledge the same before the recorder of the proper county, or any other officer who is authorized by law to take the acknowledgment of deeds, a certificate of which acknowledgment shall be, by the officer taking the same, endorsed on or annexed to such plat and recorded therewith.

"All streets, lanes and alleys, laid off and recorded in accordance with the foregoing provisions, shall be considered, to all intents and purposes, public highways, and any person who may lay off any town or any addition to any town in this territory, and neglect or refuse to comply with the requisitions aforesaid, shall forfeit and pay for the use of said town, for every month he may delay a compliance with the provisions of this chapter, a sum not exceeding one hundred dollars, nor less than five dollars, to be recovered by civil action, in the name of the treasurer of the county."

§§2328, 2329, 2330, 2331, 2332.

These statutes as amended appear as §§7831, 7832, 7833, 7835 and 7853, 2 Remington & Ballinger's Code.

It will be noted that under these statutes streets and alleys which are marked upon a plat duly acknowledged and recorded are dedicated without the use of dedicatory language. The statute explicitly so provides with reference to all spaces which are marked as or appear to be streets or alleys, and probably the rule would be the same with respect to any unenclosed place which might appear to serve the purposes of, and be intended as, a park or other public ground, even though not marked as such upon the plat.

1 *Elliott, Roads & Streets* (3rd Ed.), §130.

It follows that so far as dedicatory effect was concerned, the writing upon the plat of Railroad Addition added nothing to the effect of the plat itself so far as the dedication of all the streets shown thereon is concerned. It must then have been placed there for some other purpose. What was it?

The writing in question reads as follows:

> "The streets shown upon said plat are dedicated to be used by the public until lawfully vacated, except the strip of land 225.7 feet in width designated as Railroad Street, which is reserved for the tracks and use of said Railroad Company."

Under the conditions appearing here and the rules of law governing in such cases, no doubt can be entertained as to the purpose of this writing. Prior

to the platting of Railroad Addition, the Northern Pacific Railroad Company had filed its map of definite location showing its main track, the center of its right of way, in the center of the strip of land afterwards indicated on the plat as Railroad Street. If the decisions of this court and of the Supreme Court are authoritative, that operated to fix the right of way so that it embraced the whole of the strip in controversy. It is true the railroad company could abandon the right of way, but unless it did so clearly and unquestionably, the line of its right of way was fixed finally as to its rights and those of the public by the filing of the map of definite location.

N. P. R. Co. v Murray, 87 Fed., 648.
Missouri, etc., Co. v. Cook, 163 U. S., 491.

Nor was the map of definite location the only thing fixing the right of way of the railroad company in Railroad Street. It is more than probable that the road was actually constructed when the plat was filed, for Simonson, a civil engineer in the employ of the Northern Pacific in those days, testified that he "first went through Spokane in 1880" and that "the railroad was completed at that time" (Record, p. 308). After so many years, probably nothing but record evidence ought to be accepted as fixing positively the relation in time of one event

to another, though Simonson's testimony is borne out by the fact that the plat when filed bore tracings of the tracks and a depot building on Railroad Street, as though they were already established there. However, it is not material whether actual construction preceded the filing of the plat. The right of way was actually fixed by the filing of the map of definite location before the plat was made, or if not, then by the markings upon the plat which showed the right of way established along Railroad Street. It is enough for all the purposes of this question that the railroad company had in one manner or another, or in several fashions, definitely fixed its right of way along Railroad Street before it platted Railroad Addition, and that there has never been any abandonment or surrender of such right of way unless it was accomplished by such platting.

Under these conditions, the writing upon the plat above quoted operated to except Railroad Street from the dedication to public use which was made of all the other streets marked upon the plat, so that no title to nor interest in it passed by virtue of the dedication which would otherwise have been made by the filing of the plat and the dedicatory writing upon it. There was not, as claimed by complainants, a conveyance of the strip to the public

the grant. That, of course, is not the case. The filing of the map of definite location, say this court and the Supreme Court, fixed definitely and finally established the right of way of the Northern Pacific Railroad Company. That right of way was in existence before the plat of Railroad Addition was filed, and it consequently could not be a new right springing into existence from the grant and created by the grant. Under the conditions, however, the words operated clearly and unmistakable as an exception. The marking of Railroad Street as it was marked on the plat and the general dedicatory words would have operated to convey it to the public, just as such marking and such words conveyed all other streets marked on the plat. But here came in the words of exception, whereby there was taken out a part of the thing (the streets) granted, and title retained to the excepted thing in the grantor. This constituted an exception under well established rules of law, not only under the definitions of the text writers, but under the cases appearing in the books.

In *State v. Wilson,* 42 Me., 9, a way had been used by the public for some years before the conveyance of the land across which it was laid. The conveyance contained these words, "reserving to the public the use of the way laid across the same

from the county road to the river." Held an exception of the way from the conveyance.

In *Wood v. Boyd* (Mass.), 13 N. E., 476, a deed contained this clause, "reserving to the owner of the estate and others adjoining * * * a right of passage way over the within granted premises as specified" in a former deed. This was held to be an exception of the right of way from the conveyance.

In *Bridger v. Pierson,* 45 N. Y., 601, a way was in use prior to a conveyance of the land containing the following clause, "reserving always a right of way as now used on the west side of the above described premises for cattle and carriages from the roadway to the piece of land now owned by R." Held an exception.

In *Whitaker v. Brown,* 46 Pa. St., 197, a deed in fee of land contained this clause, "saving and reserving nevertheless for his own use the coal contained in the said piece or parcel of land, together with free ingress and egress by wagon road to haul coal thereover as wanted." It was held this was an exception of the coal from the grant.

In *Randall v. Randall,* 59 Me., 338, a deed conveying land contained the following clause, "excepting the reserve of the four rows of apple trees on

the north side of the orchard and the land on which they stand; also so much of the second growth of ash timber as I shall need for my own personal use." This was held no reservation, but an exception.

The gist of the decisions above cited is that wherever land is conveyed with words of limitation upon the grant referring to something already in existence and which does not for the first time arise and issue out of the grant, then the words are considered to be an exception of the thing referred to from the grant and not a reservation of a mere right to use the granted premises, and this regardless of the form of words which may be employed. In the case at bar, the Northern Pacific Railroad Company had established its right of way embracing Railroad Street before the addition was platted. No other effect can be given to the language used than an exception of the strip in controversy from the general grant of the streets marked upon the plat to public use, unless the authorities heretofore cited shall be held unsound.

The construction of the language in question which the law demands is equally demanded by common sense. We shall not follow complainants' counsel through the mazes of casuistry and refined distinctions by which they endeavor to evade the

rule of law just stated. The thought is concealed in varied phrasings, but all the contentions urged come around to these:

1. No right of way existed across section nineteen prior to the filing of the plat, so the right of way was a new thing arising out of and because of the grant.

2. The Railroad Company intended to dedicate Railroad Street to highway use, merely reserving to itself the right to use the highway jointly with the public in a manner not inconsistent with the public use.

The first proposition is not true for one very sufficient reason, that the *Cook* and *Murray* cases stand in the way, and for another, that the plat itself shows the right of way fixed along Railroad Street before the dedication to the public became effective. The second proposition is a mere begging of the question.

The intent of the dedicator only becomes material when such intent is in doubt. The intent of the dedicator can never be in doubt when he has used language which the law considers apt to express a certain intent. If apt language was here used to except Railroad Street from the dedication of all the other open spaces shown on the plat of Railroad

Addition so that no title to such street passed either by the filing of the plat or of the dedicatory words written thereon, there is no more occasion or right to inquire into the intent of the dedicator than to inquire whether by apt words of conveyance it was indeed intended to convey the estate purported to be conveyed. Inflexible rules of law as much forbid resort to extraneous evidence to explain that which needs no explanation in the one case as in the other. The distinction between an exception and a reservation is no mere technicality of the law, but is an established rule of conveyancing by which the courts determine the effect of a conveyance. But if the question is here supposed to be doubtful so that resort must be had to extraneous evidence to ascertain the intent of the dedicator, then it all points one way, to the intent being to exclude Railroad Street, the right of way of the company, from the dedication, so that no title to the public should pass by virtue of it.

To demonstrate this we invoke first a well established presumption, which is that where issue is joined upon the fact of dedication, the burden of proof to establish the fact lies upon him who asserts it, at least where the dedicator or his privies deny the fact.

"The intention of the owner to dedicate

must be clear, manifest, and unequivocal."

Shell v. Paulson, 23 Wash., 531.

"The intention to dedicate will not be presumed, and the clear intention must appear."

Columbia, etc., Co. v. Seattle, 33 Wash., 519.

"An intention to dedicate will not be presumed, but must clearly appear."

Provident Trust Co. v. Spokane, 63 Wash., 94.

"It is now the settled law of this state that a railroad company may dedicate land which it owns in fee, or in conjunction with the owner of the fee, land in which it has an easement, to the public as a highway. Green v. Canaan, 29 Conn., 157. But an intention to do so ought to be manifest. It will not be presumed; on the contrary, in the absence of fraud, or conduct which misleads others, courts will require that it be clearly and satisfactorily proved."

Williams v. Ry. Co., 39 Conn., 519.

"A dedication is not presumed, but must be shown by the acts and declarations of the owner of such a public and deliberate character as clearly shows an intention on his part to surrender his land for the use of the public, and the burden of proof is on the party asserting such dedication."

Hogue v. Albina, 10 L. R. A., 675.

Aided by this presumption, let us look to the situation of the Northern Pacific Railroad Company when the dedication was made and see if it could have intended to dedicate its right of way unreservedly as a street, save that it would be per-

mitted to maintain its tracks thereon, as shown on the plat, which is what complainants assert was its purpose.

Complainants introduced evidence tending to establish that the plat of Railroad Addition was a standard form, one which was used in platting townsites and additions to towns along its system wherever the conditions were similar to those in Spokane Falls. Knowing the tendency to standardize which exists among railroad companies in dealing with their lands, it may be presumed that this was one of the standard forms of the company. If so, it, of course, was prepared under the advice of counsel learned in the law. If we suppose that these counsel believed in 1881 that the Northern Pacific Railroad Company could deal with its right of way as it chose, they nevertheless may not be presumed ignorant of every other rule of law applicable to the situation, nor may it be presumed that the officials of the railroad company were blind to the practical considerations which would influence the situation. The dedicator knew, then, because the statutes of Washington territory explicitly so provided, that the dedication of a strip of land for highway purposes operated as a deed to the land for such purposes, and that it thereby passed from the ownership and control of the dedicator and vested in the

municipal authorities. It must have known, also, that the street use would be paramount to railroad use if a dedication was made, and that the manner of railroad operation, if not the right to operate in any manner at all, would rest with the corporate authorities. It must have known that if it granted the street to public use, it could not reserve any right to use it in a manner inconsistent with the public use. It must have understood the thousand annoyances, embarrassments and positive obstructions to railroad operations which were bound to result from having the main track of a transcontinental railroad, with its necessary sidetracks and depot buildings, in a public highway, even though that highway was in a small town, and even though they supposed it could by no possibility ever be anything but a small town. Every incentive forbade it to dedicate its right of way, tracks and depot buildings for street use, and none impelled it so to act. If, as counsel suggest, an open space along its tracks then seemed desirable, what need was there to dedicate such open space as a street in order to secure the advantages of the open space? By leaving the space where it might be used by the public with the consent of the company, and with the power to take it from the public when the needs of the company should require, it would obtain all the

benefits which counsel suggest, burdened by none of the very apparent disadvantages which would result from the dedication of the space as a street. Counsel, of course, would put the Northern Pacific officials of those days in an unseeing class which neither appreciated the possibilities of the country into which they were constructing the road, nor supposed that conditions would ever change from those then existing. It might be questioned why it was then that they were constructing a railroad into the country, for, clearly, if vast possibilities were not present, and if they did not anticipate an extraordinary change in conditions following the construction of the railroad, the railroad would never have been constructed. It would be as sensible to deny to Congress foresight concerning the possibilities of the country and what might be anticipated with the construction of a railroad as to deny such foresight to the constructors of the railroad. But however blind they were to the possibilities of the future, no reason could have occurred to them for dedicating the right of way as a street, while every practical consideration forbade them so to act.

With the ordinary presumption against the intent to dedicate much strengthened by the obvious disadvantages of dedicating the right of way to highway purposes, let us study the language deter-

minative of this question before passing to the authorities dealing with analogous cases.

Some effect, as we have said, must be given the language. It must be presumed, in view of the circumstances surrounding this dedication, that it was used understandingly and for some definite purpose. This definite purpose was evidently to fix the status of Railroad Street, for there was no occasion to use such language with respect to any other part of the plat, all the streets shown upon the plat being dedicated by the mere marking of them upon the plat, and being furthermore dedicated by the general granting words written thereon.

Now, what was provided? The streets shown upon the plat, it is provided, "are dedicated to be used by the public" except the strip of land "designated as Railroad Street which is reserved for the tracks and use of said Railroad Company." Reserved from what? Why, plainly, from the use of the public. Reserved for what purpose? Just as plainly, for the uses of the company. How may such language be construed to express an intent that it, too, was devoted to the public use, the railroad company retaining no more than a right to use it jointly with the public to the extent that its use would not be inconsistent with the public use? Yet if complainants' theory is accepted, this language

must be construed to give the public entire dominion over the strip, reserving to the company the mere right to use it for railroad purposes in such manner as should not interfere with the right of the public to use it for general public travel.

The language is significant in another fashion. "The streets shown upon said plat are dedicated to be used by the public * * * except the strip of land 225.7 feet in width designated as Railroad Street, which is reserved for the tracks and use of said Railroad Company." If the strip in controversy was intended to be a street with all the incidents attaching to all the other streets in the addition, reserving only the right to use it for railway purposes, why this circumlocution in expression? Why was it not said "except Railroad Street," instead of "except the strip of land 225.7 feet in width designated as Railroad Street"? If the intent was that claimed by complainants, why was it not expressed in simple direct language, "the right is reserved to use Railroad Street for railroad purposes"? Surely the high officials of the railroad company and their able legal advisers possessed sufficient command of the English language to express a simple thought in plain language. If the strip marked upon the plat as a street was intended to be a street, why did they not call it so, instead

of going around Robin Hood's barn to call it "the strip of land 225.7 feet in width designated as Railroad Street," and if it was intended to dedicate Railroad Street as a street with all the other streets in the addition, reserving only the right to use it for railroad purposes, would it not have been much more natural to have provided: "The streets shown upon said plat are dedicated to be used by the public until lawfully vacated, the right to use Railroad Street for railroad purposes being reserved."

It may be said that we attach too much importance to the particular language used, for that the dedicator may not have considered carefully the language employed, but have expressed itself in loose fashion. Such a criticism of our position can come with no good grace from complainants' counsel, who are insisting so strenuously upon the great importance which must be attached to the labeling of the strip in controversy "Railroad Street" upon the plat. Nor do we think it is justifiable from any standpoint. We are seeking now to arrive at the intent of the dedicator by construing its language. What reason is there for doing violence to this language in order to impute to it one meaning when the natural construction of it gives to it another meaning? Why not adopt the natural instead of the forced? Possibly there might be some justifi-

cation in so doing if the rule of law was that the dedication was to be presumed, if possible, and every presumption was to run against the dedicator. We have seen, however, the rule of law is otherwise. Where the presumption of the law demands a certain construction, where the situation of the dedicator demands the same construction, and where the language itself can bear no different construction unless violence be done it, what excuse can there be for arriving at a different meaning by putting a forced and unnatural construction upon it? Is it not more rational to ascribe to the dedicator the ability to use the English language to express its intent in natural fashion rather than to suppose it incapable of expressing itself clearly and directly?

Turing to court decisions dealing with analogous cases, we take up first Washington cases, since these construing the ruling statutes are ruling in so far as the cases are analogous to the case at bar.

In *Robinson v. Coffin,* 2 W. T., 251, the controversy was with respect to a long strip of land eighty feet in width abutting at one end upon a street at right angles to it and at the other end upon the end of a street in direct line with it, and also eighty feet in width, and upon another street at right angles to it. It separated two blocks of platted lots.

The strip was not described as a street, or in any other way save that it bore the letter "C." It was held that an intent to dedicate the strip as a street could not be imputed to the dedicator, though "it is true that it might well serve as a convenient street for access to the lots abutting it," and though "the lots, if it be not a street, are indeed without any way of approach."

In *Columbia etc. Co. v. Seattle,* 33 Wash., 513, a dedication as a street of an open space shown upon a plat was sought to be established by differences in markings and other indications. This was held not sufficient to establish the "clear intention" to dedicate which must appear.

Nearly akin to the case at bar so far as this question is concerned is *Provident Trust Co. v. Spokane,* 63 Wash., 92. There a plat was filed upon which a street was marked with a strip along one side of it, apparently separating it from the platted ground, which was marked "R. R." The legend on the plat contained proper dedicatory words, as here, and then: "We reserve, however, the strip of land twenty feet in width marked 'R. R.' for railway purposes, also the exclusive rights in all of said streets to lay down pipes and carry water and gas through same." It was held that the strip referred to was not dedicated as part of the street.

It seems to us that the above case rules the present. Railroad Street is no more definitely marked as a street upon the plat of Railroad Addition than was the strip "R. R." upon the plat there considered. The words of dedication were as positive in the one case as in the other. And if on the plat of Railroad Addition Railroad Street was referred to by implication as a street when it was said "the streets shown upon said plat are dedicated * * except the strip of land * * designated as Railroad Street," like implication appears in the other plat. There it was provided "we do * * * dedicate as public highways the streets" marked on the plat, but "reserve, however, the strip of land twenty feet in width marked 'R. R.' for railway purposes." Followed then words purporting to reserve the right to lay pipes in all the streets, another inclusion by implication of the 'R. R.' strip with the streets. The language, too, smacked as strongly of reservation as opposed to exception as language could. Yet it was held the whole plat showed an intention to except the strip "R. R." from the general dedication to street use. Why shall not the case rule here?

A plat was filed under a statute substantially like that of Washington Territory. It showed a block of ground surrounded by streets, upon which was

written "this park is reserved from public use, and title kept in proprietors." It was sought to hold this as a dedication, but the courts held otherwise.

> "To what public use did the proprietors devote this parcel of land? They say on the face of the plat: 'This park is reserved from public use, and title kept in the proprietors.' This statement is, in effect, repeated in the acknowledgment. They not only say the title is kept in themselves, which would have passed to the county had the square been devoted to public use, but they say the property is reserved from public use. Stronger language could not have been used to show that they did not, and did not intend to, devote the parcel of land to public use. This statement completely overcomes any inference that might have been drawn had no statement been made, or had the word 'park,' only, appeared upon the face of the plat. But the contention seems to be in effect, if not in terms, that we should strike out and disregard all this statement after the word 'park.' We know of no rule of law, ancient or modern, which gives to the courts power to deal with contracts in any such a way. We must take the statement as a whole; and when that is done it is shown beyond all doubt that the square was not, by the plat, devoted to public use."
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> *Baker v. Vanderburg* (Mo.), 12 S. W., 462.

The facts in the cited case are no more conclusive against dedication than they are in the case at bar. Here the dedicator first says "the streets shown upon said plat are dedicated to be used by the public," then qualifies the grant by

providing that Railroad Street is not dedicated to the use of the public, but is "reserved for the tracks and use" of the dedicator.

A very strong case in this connection is *Duluth v. Railway Co.* (Minn.), 51 N. W., 1163. Upon a plat a street was shown. Extending along this street for its whole distance was a light black line. Forty feet south of it and running parallel with it was a heavy black line, thus leaving a strip forty feet in width along the southerly line of the street. At one end of the street the light black line was joined by a cross line with the heavy black line. At the other end it was left open. This strip was in no way marked to indicate its character, and the question was whether it was intended to be dedicated as a part of the street, that is to say, whether the light black line or the heavy black line was the southerly line of the street. First remarking upon the principle which rules all cases where the question of dedication is involved, *viz.,* that the intention of the dedicator controls and that in ascertaining that intention every part of the plat must be looked to and all its parts be given effect, the court said:

> "In construing the plat, as respects the extent of the dedication thereby made, and

> the extent of the corresponding relinquishment by the dedicator of his property rights, it is necessary to consider particularly the effect of the lines inclosing the narrow strip of land south of Dock street. The principle, applicable generally in the construction of written instruments, which forbids that any part to which meaning and effect can reasonably be ascribed shall be regarded as meaningless, is applicable here; and these lines on the plat are not to be rejected as evincing no intention on the part of the dedicator, and as having no reasonable effect."

Deducing from the whole plat that the dedicator did not intend to dedicate the strip referred to as a part of the street, the court said:

> "Nor can this inclosed space be deemed to be a street or public way contiguous to Dock street, and separated from it only by an imaginary line. That would make the northerly line of this strip entirely meaningless, and of no effect, unless to conceal or obscure, not to express, the intention. Nor is there anything indicative of an intention to appropriate this tract to any public purpose other than that of a street. If it had been so intended, the purpose to which it was devoted would have been in some way shown. Yet these lines were drawn, and the inclosure made, for some purpose connected with the platting and dedication; and if it was not to mark this strip as being given for some public use, it is natural to suppose that it was to denote that it was intended for the private purposes of the dedicator, or to limit the extent of the dedication for public use. It does not appear what particular

> private use the proprietor intended to make of it, nor is that necessary. It is enough that the intention was manifested on the plat, as we think it was, to reserve or withhold it from use for streets or other public purposes; or, in other words, not to include it in the dedication made for such purposes."

In *Lever v. Grant* (Mich.), 102 N. W., 848, a plat showed a street with dotted lines running along one side of it between it and lots and blocks which would otherwise have abutted upon it, the strip so segregated being marked "private way." The legend on the plat contained appropriate dedicatory words of the streets and alleys shown on the plat, with these words following: "except the north thirty feet of Custer Avenue, which we reserve as a private way." It was held that by such language the dedicators excepted the strip shown as a private way from the dedication. Similar in effect is *Detroit v. Myers* (Mich.), 116 N. W., 621.

For other cases where, under varying conditions, it was held no intent to dedicate appeared, see:

Town of Mt. Vernon v. Young (Iowa), 100 N. W., 694.

McLean v. Iron Works (Calif.), 83 Pac., 1082.

Matter of New York, 82 N. Y. S., 417.

Several of the foregoing cases bear squarely

upon the point of which complainants' counsel seek to make so much, *viz.,* that if Railroad Street was not intended to be dedicated as a street, the lots abutting thereon would be left without other means of access than the alleys in their rear. The same condition appears in the cited cases, except that in some of them no means of access to the lots was left, yet this fact was held not sufficient to establish an intent to dedicate.

Much is attempted to be made of the so-called "practical construction" put upon the instrument by the railroad company and the public during the period for some years after the platting of the addition, it being claimed that during those years Railroad Street was used as a street by the public with the consent of the railroad company. We shall not answer this argument at length under this head for the reason that everything which is urged by complainants as a practical construction by the parties is urged by them under the next head wherein they claim a common law dedication of the street by user. It suffices here to say that the authorities which we shall cite under the next succeeding head show how very usual it is for railroad companies to permit the public the use of their lands not at the

moment needed by them for railroad purposes for street purposes, it being convenient to railroad companies and the public alike that the lands should be so used until the railroad companies needed them, and it will appear from those authorities that the courts have never held such use, even under circumstances more compelling than those upon which complainants here rely, to be an implied dedication. The use has always been held to be permissive and to vest no right in the public. It need only be remarked here that the evidence most overwhelmingly establishes that whatever use was made of Railroad Street by the public was the same use which was made of all other vacant ground in the village of Spokane Falls, during the period in question, whenever the convenience of the public required such use, and that the railroad company permitted it merely because it then had no use for the vacant strip, and its operations were in no way interfered with by the character of use which was made of it. It will appear clearly, also, that as the railroad company needed the strip it occupied it without any question ever having been made of its right to do so, and that the City of Spokane has ever recognized the company's right to do with Railroad Street as its private property as it pleased.

We shall reserve for the next head, also, remark upon the controversies and litigation in early days between the people of Spokane and the railroad company concerning the company's right to erect buildings in Railroad Street where they would block the intersecting streets. These show that the people of Spokane in general, and complainants' senior counsel in particular, did not in the '80s and '90s possess the lively imagination which marks the complainants' testimony and contention here. Some trifling little incidents like the inclusion of Railroad Street as the private right of way of the company in assessment districts created for the purpose of defraying the expense of paving intersecting streets; its taxation for general revenue purposes as the company's property, and the payment of both special assessments and general taxes thereon, will also then be adverted to.

Considerable space in complainants' brief is devoted to the wrong of the railroad company in labeling Railroad Street as a street if it was not intended to be a street, it being urged that intending purchasers would see and be impressed by the conspicuous designation of the street, but would not note the script in the corner of the plat by which the street was excepted from

the dedication. The legal bearing of this phase is not pointed out, and we are unable to see any. However, we suppose if one purchases by reference to a plat one is bound by all the information conveyed by the plat, and if one purchases in view of the conditions appearing upon the ground one is bound by all the information which is obtainable from a view of the ground. The plat showed upon its face that Railroad Addition was platted by the Northern Pacific Railroad Company, and that the tracks and depot of that company were in Railroad Street. The ground itself showed the same things. The Northern Pacific Railroad was something of a factor not only in Spokane Falls but in the whole Northwest at that time, and we imagine that the people of that section were fairly familiar with the terms of its grant. Whether they were or no they were charged with notice of it.

> "In this case, by act of congress, a strip of land four hundred feet wide was granted to the Northern Pacific Railroad Company. This was not only a public act, but it was a notorious one. Knowledge of this act must be imputed to every intelligent person in communities where the Northern Pacific railroad is projected. It is a matter universally noticed and talked about. It is a matter of common knowledge that the right of way of railroad companies is not limited to the

> amount of land actually occupied by their tracks; and it seems to us that purchasers of any portion of the right of way which was granted by public statute were put upon inquiry concerning the equitable title to such land."
>
> *Dennis v. N. P. R. Co.,* 20 Wash., 334.

Every one who purchased lots in Railroad Addition knew, then, that Railroad Street was a part of the right of way of the Northern Pacific Railroad Company, and that the company was using and intended to use at least a part of it for all its necessary right of way purposes. This was certainly sufficient to impress all intending purchasers with notice of the full extent of the company's rights in Railroad Street. As was further said in the *Dennis Case, supra.*

> "We have no doubt that they did possess this knowledge; that they knew that the track and road bed were there, and that the road was operated there; and, having that knowledge, the law imputes to them the further knowledge of the true ownership of the land. It was sufficient, at least, under all the authorities, to have placed them on inquiry, and such inquiry would have resulted in the knowledge that the railroad company was the claimant and owner of the land in question."

In view of the presumption in which the law indulges, and the plain words of exception by which Railroad Street was segregated from the

general description of the streets dedicated and removed from the operation of the grant, we cannot think there is occasion for or right in the courts to inquire into the intention of the dedicator. If it shall be said, however, that there is ambiguity present, then the intention of the dedicator must be arrived at, for its intent rules. In ascertaining that intent, the courts cannot look alone to the fact that a certain strip of land was by the dedicator dubbed Railroad Street, and it be therefrom said that it necessarily was thus made a street. Like every other instrument from which must be deduced the intent of the person who executed it, the plat must be looked at from every side, within its four corners, and the same effect must be given to one part of it as is given to any other part. *Duluth v. Ry. Co.,* 51 N. W. 1163. The court must look, too, at the situation of the dedicator and judge from that the likelihood of the one act rather than of the other. Very cogent in this connection is the language of Judge Rudkin in his opinion ordering the dismissal of this case:

> "There is no magic in the use of the word 'street.' The entire plat, including the dedication, must be construed together, and when so construed it plainly appears that the strip of land, ill-advisedly designated as a street, was in fact excepted from the dedication and reserved for the tracks and use of the railway

> company. It is no doubt true that the use of a strip of land as a mere right of way for a railroad is not entirely incompatible with the use of the same strip of land as a public street, but at the same time its use for other legitimate railroad purposes would be. Furthermore, such common user is so impracticable and so hazardous that a court should not readily presume that it was authorized or intended. The use made of this strip of land from 1881 to 1889 was but natural under the circumstances and was wholly insufficient of itself to constitute a common law dedication." (Record, 366.)

In view of these considerations, it is difficult to see how there may be deduced the "clear, manifest and unequivocal" intent of the owner to dedicate the street which must appear before the dedication may be declared. *Vide* Washington decisions heretofore cited.

Another thought is suggested in complainants' brief which is refuted with admirable effect in Judge Rudkin's opinion:

> "The sale of lots with reference to the plat in question does not create an estoppel. For while the plat showed Railroad Street it also showed plainly that it was not a street in fact. but was excepted and reserved for the tracks and use of the railway company. Indeed it would be far easer to raise an estoppel against the property owners who have stood by during all these years while permanent and lasting improvements were under way at great expense on property which they now

lay claim to as a public street." (Record, 367-368.)

Another consideration might have been added to that referred to in the portion of the opinion just quoted which operates strongly as an estoppel against all these complainants whose property abut upon the intersecting streets, noticeably against the complainants Turner and Shinn, whose property lies for such a distance along Howard Street on either side of Railroad Street. It appears from the testimony that all the intersecting streets in Railroad Addition have from time to time been improved and finally paved, as city streets are. Local improvement districts were created to bear the burden of such improvement and paving, and Railroad Street where it abutted upon each side of the intersecting streets was included in the several assessment districts as the private right of way of the Northern Pacific Railroad Company, and it was required to and did pay taxes upon such portions of what is said to be Railroad Street as its private right of way, as its part of the burden of improving and paving the intersecting streets. The complainants owning property abutting upon these streets received the benefit of such action, for had the municipality treated Railroad Street as a street, then, of course, the

Northern Pacific Railroad Company could not have been called upon to bear any part of the burden of paving the intersecting streets, and the burden of such paving would have been by so much the heavier upon abutting owners. These gentlemen who are now so concerned because the City of Spokane does not claim that Railroad Street is a street were very much pleased when, to the advantage of their pocketbooks, the City of Spokane in the past considered Railroad Street not to be a street, and taxed it to bear the burden of paving the intersecting streets upon the theory that it was the private property of the Northern Pacific Railroad Company. Estoppel under such circumstances ought to be invoked against these complainants, if it may ever be invoked in such a case.

IV.

Common Law Dedication.

The same evidence which complainants' counsel relied upon under the preceding head as a practical construction of the plat to establish the dedication of Railroad Street is relied upon to establish a common law dedication of the street. It is as ineffective for one purpose as for the other, not more convincing for one than for the other.

The evidence reflects such a condition as one would expect where there has been such a kaleidoscopic change in circumstances from 1881 to 1913 as is here apparent. It shows a great transcontinental railroad, built under the encouragement and with the aid of Congress in order that a vast undeveloped country might be made accessible and so be populated, constructed through one of the small villages which were the sole urban communities along the line of the railroad at that time. Some of those communities the railroad officials undoubtedly expected would grow into cities, though, of course, they could not guess for which such fortune was reserved. So in Spokane Falls, Cheney, Sprague, Ritzville, no doubt in every other village through which their line lay, the towns were platted along the right of way in uniform fashion. In all those cases there was reserved a width of 225 feet of the right of way along the main track of the railroad which was called "Railroad Street," it being provided in all such cases that this strip was reserved for railroad tracks and uses. That strip was ample for such purposes, as experience has shown, though the villages grew into cities. In 1881 and for many years afterwards, it was vastly in excess of the company's needs even in the

communities which most rapidly grew. During this formative period, the strip was used by any person who found it convenient to do so for any desired purpose so long as such use was not inconsistent with all the desired railroad uses. The semi-public use of such strip continued until it became inconsistent with the railroad use, and then it was by the railroad company abrogated. Such use in the communities which did not grow continues down to the present time. In Spokane it continued for a number of years, gradually being decreased as the needs of the railroad company increased, and being finally put an end to a number of years ago. Always and everywhere this early semi-public use and the subsequent resumption of possession by the railroad company as its needs required has gone forward without let or hindrance, and without anyone, until the commencement of this action, dreaming that the railroad company was otherwise than strictly within its rights in taking possession of the strip and ousting the public use thereof as fast as it needed it. The evidence goes further than that and shows that in the minds of the old-timers who testified in this case, and of some of the counsel who now urge most vigorously that the action of the railroad company was unauthorized,

there was never any thought that Railroad Street was ever dedicated as a street, either by statutory or common law dedication, until some lively imagination suggested the theory now urged. The conduct of the people of Spokane Falls, and the conduct of complainants' senior counsel in the early days, when if it had been dreamed Railroad Street was a street it would have been most vehemently urged because then freshest in mind, disprove any claim which may be made of a street dedication.

Turning now to the evidence. In 1881 Spokane Falls was a village of between 300 and 400 people (227). By 1889, just before the great fire which wasted Spokane, it had grown to a population of about 10,000 (225). It has a population now of considerably over 100,000. Built in a valley along a mountain stream, the natural topography of the townsite varies greatly, some portions being level, gravelly ground and other portions being extremely rough and broken with basaltic rock out-croppings. Wherever these occur, the streets must be graded before there can be travel thereover. Down to as late as 1889, though Spokane Falls had then grown to a town of considerable size, there had been little grading of the streets. Gandy, complainants' principal witness, testified "at the time of the fire in 1889 the town had close on to 10,000, between

9,000 and 10,000. First avenue had not been graded at the time of the fire; some grading had been done on Howard street clear over to Second. I don't think any of the cross streets had been graded across the track. Some grading was done on Second avenue very early. No cross streets had been graded to the south of the track except Howard" (227-228). Newbery, called by defendant, testified: "There were no graded streets in Spokane in 1884. By 1886, Riverside avenue had been graded some, I think. I think Riverside was the first graded street, and possibly Howard. * * * You see, there were so much of these things wide open, and the streets were not graded, and it would be pretty hard to say just where a house was. The only place where there was a graded street at all was Riverside avenue" (315).

It may be said in this connection that Second avenue is the first street south of Railroad Street and running parallel with it, while on the north and running parallel with it in the order named are First avenue, Sprague avenue, and Riverside avenue. The intersecting streets principally referred to, running from west to east in the order named, are Monroe, Lincoln, Post, Mill, Howard, and Stevens. First avenue was one of the rocky streets not graded, while Railroad avenue lay along

one of the level, gravelly strips in the city, and whatever of rock out-croppings there might have been there had, of course, been smoothed off in the grading for the right of way. Testified Gandy in this connection:

> "First avenue was in the same condition then. It was full of rock and was not cleared off for several years afterwards. But Railroad avenue not having any rocks in it at all, was used as the principal street on account of its being free from rocks. The travel was principally there on account of its being a free open street, while First avenue was filled with rocks" (223).

And again this witness says:

> "The railroad right of way all through was flat, level, and gravelly, no obstruction to travel in it" (228).

Shinn, one of the complainants, testified:

> "They traveled along Railroad Street promiscuously, now on one side and now on the other. They could not cross over the tracks except at Howard and Post, the only streets open. They could not cross over the tracks very well with a team; a person afoot could. In traveling along, at times you might be on Railroad Street, and other times on private ground. They generally followed the line of the railroad. They might be on the street line of the lots or might be on the street line of Railroad Street, but they were never liable to be off the right of way because that was graded—I wouldn't call it graded, but it was smoothed off so that you could drive along."

"Mr. Graves: The railroad kept it in better condition for people to cross to the depot; is that it?"

"I guess they kept it in better condition for their own use and not the public. In traveling, sometimes they might be on the street and sometimes on private ground. They drove principally on the railroad on the two lines here (indicating), this was their principal drive."

As might be expected under the circumstances, travel was not confined to the streets anywhere in the village, but followed the line of least resistance, and this continued until the streets began to be graded and the building of houses began to force travel into street lines. The witness Nash for complainants testified:

"The photograph shown here fairly represents conditions as they then were—about the time the railroad came. It shows some level ground, a lot of rocks and a lot of trees. People rode and drove where they chose. As the town grew up and places were fenced, we were confined to particular places. They traveled wherever they pleased until they were forced out. This came to an end in 1887 to 1889. About this time they had been pretty well confined to streets. There were lots of rocks and big hummocks all around, but not on the north side of the railroad. There were some small rocks there, but they did not interfere with travel."

During the early '80s the business district was on lower Howard street, from Front avenue south

(221). Front avenue is not shown upon the plat of Railroad Addition, and it may be said in explanation that it is the fifth street north from Railroad Street, the streets intervening being in the order named First, Sprague, Riverside, Main, and Front. The depot building, it will be seen by reference to the plat, was on the east side of Lincoln street, three blocks west of Howard street. The travel from the business district was down Howard to Railroad Street, and then along it to the depot (220-222). As Mr. Drumheller, one of complainants' witnesses, said, "As to the condition of Railroad Street from the time it was platted down to 1889, practically all the travel and traffic from the main part of town went down Howard street to the track, and then down Railroad Street to the depot, backwards and forwards" (269). Cook, for the defendant, testified: "In a business way the center of town in 1883 and 4 was at Howard and Main. During these years, in proceeding to the depot we went up Howard and then down on the south side of the depot. If we went afoot or horseback we cut across. The depot was west of Howard. We went where there was no resistance, and went that way up to the time of the fire" (316-317).

Not only did the public in traveling from one

place in the village to another have no definite route marked, but there was no definite line of travel along Railroad Street. Testified Gandy:

> "All that tier of blocks, like Railroad Street, was level, flat, gravel ground. There was no line of demarcation between the north line of those blocks and the right of way of the railroad, nothing at all. There were stakes set by the surveyors in front of our lots. On the south side people just drove along there promiscuously, either on the right of way or on the north tier of blocks where there were no buildings" (229).

Drumheller, for complainants, testified:

> "Up to the fire I think the business center was not far from Main and Howard, that is, three blocks north of the railroad track. It centered on north and south streets, mostly on Howard. In those days there was a little travel everywhere and anywhere on the right of way; up to the time the town began to build up they usually went as they pleased" (270).

Newbery, for defendant, testified:

> "As to travel along the railroad right of way during the year 1883 and along there to 1889, anybody went pretty near anywhere they wanted to; they traveled along the right of way and whenever the cars happened to stop to discharge freight or anything of that kind they would drive up to them. It was not a graded street or anything of that kind, but we never followed any street when we came from downtown going home" (313).

Cook, for defendant, testified:

"From that time to the fire we traveled most anywhere. There wasn't any obstruction anywhere over the country. If there was a building or a line of buildings we went around them. There was nothing on this side to indicate streets much, except Howard, up to the time of the fire, and after. I lived always on the hill south of the tracks."

Glasgow, for the defendant, testified:

"As to the condition of the right of way from the time I came here in '85 there were no streets; you could drive anywhere except where the rails were laid. There were really no streets; didn't know where the streets were. This was true for several years up to '85 or 6 when Post street was opened through. Howard street was opened through also before that. Between 1882 and 5 the railroad right of way had some warehouses on it on both sides. As to driving we used to unload our wheat, the cars would be standing on the side track and we would drive in and unload on what we called the team track. These team tracks were situated between 1883 and 1885 between Howard and Monroe. I don't remember how many tracks. The right of way was not used by the public in general unless they had business on the railroad tracks; that was what we used it for. If I were proceeding from the depot there in 1883 or 4 down to Main and Howard, on foot, or horseback, I would cut across these different blocks where Davenport's hotel is being built, and upon the street, angling through it between blocks. With a team I would take the same course. This course of travel ceased as from year to year there would be new

buildings stuck up somewhere that would finally throw them around into the street."

The houses which were built along the right of way, of which so much is attempted to be made, it develops were insignificant little affairs. Gandy, defendant's witness, testifying they were wooden buildings, most of them one story in height, though one or two were two story buildings (221), while the witness Thwaite said they were one and two story buildings, used for lodging houses, some saloons, fruit stand, lunch counter, etc. (273). Glasgow, defendant's witness, stated that he remembered "a couple of little buildings opposite, hot-cake joints" (320). The witness Johnson, speaking of the buildings, said: "There might have been a few shacks around there" (343).

The public use of the strip in controversy as outlined by the testimony above referred to is clearly not sufficient to establish a highway by adverse user, for the use shown is on its face permissive in character, has no suggestion of adverse use, and does not possess the requisite factors of continuity in time and precision and certainty of travel without which there is no establishing a street by adverse user. The authorities we shall hereafter refer to make that clear, but before going to them we wish to remark

upon the practical construction of the situation by the railroad and the municipality and its citizens during the whole period from the filing of the plat down to the present time, for the evidence in that behalf renders it impossible to hold Railroad Street to have been dedicated to highway uses.

Railroad Street is shown on the plat 225 feet in width. It was occupied at the first by the main track, two sidings, and the combined passenger and freight depot of the company. Another building used for a freight warehouse alone was built on the strip in 1882. As the business of the company increased, additional tracks were from time to time put down, no one taking any account of the periods of construction or where they were placed. After the fire in 1889, the company rebuilt its depot buildings in Railroad Street, put down additional tracks wherever needed, and because of the destruction of so much of the warehouse and storage room in the town, used its cars and tracks largely for storage purposes. About the same time it began to lease portions of the strip in controversy along the north side thereof for warehouse purposes. Such leasing has continued ever since as fast as it could secure applications for that purpose, and at the

present time the north 100 feet of Railroad Street, as it was platted, is occupied solidly by large brick wholesale and ware houses, leaving but 125 feet of the original 225 which is used for railroad operation. These buildings cover "a good portion" of "a well defined private way" which Gandy testified once was in Railroad Street (229). It is not pretended that any objection was made by the municipality or the public generally to the company occupying Railroad Street as it pleased with its tracks or buildings. The only objection ever made, as will be noted later, was to the company constructing permanent buildings on Railroad Street across the intersecting streets.

In the examination of witnesses and in their brief, complainants' counsel euphemistically refer to the laying of tracks on the street wherever the company pleased and to the erection of permanent buildings upon the street as "encroachments" thereupon. We suppose the term which may be applied to these acts will not greatly alter their character and effect. Here is a strip of land which it is endeavored to establish as one of the principal streets of Spokane from the birth of the place, and it appears that the railroad company has from the beginning occupied the so-called street with tracks and buildings as it pleased, and

has used it for any other railroad purpose it chose without objection from municipality or individual. Something more than euphemism is required to deprive such acts of their determinative effect.

It is said the railroad company never obstructed the use of the street or gave any intimation that it was not a street just as were all the other streets in Railroad Addition. The construction of a passenger and freight depot in the so-called street in 1880 or 1881 of a freight depot in 1882, of tracks whenever and wherever desired, of new depot buildings after the fire, the use of the street for storage purposes as desired, and the building up solidly of 100 feet along its north side for its entire distance with great brick buildings, would seem something of an obstruction of it for street uses and a slight intimation that the railroad company did not consider it to be a street. Furthermore, the witness Cook testified:

> "With the exception of one warehouse on the south side of the track, prior to the fire, there was nothing to hinder people from driving along the south side of the track from Washington street west for several blocks, and they did drive there. I did not travel that way myself very often after I was told not to. A man named Pond, who was roadmaster, stopped me once some time in 1883 or 84. I was down at the warehouse I have just re-

> ferred to, on the south side near Post and Mill. I was going down there to haul some machinery. I went in there because it was handy. The machinery was pretty heavy to lift, and I didn't want to take it through the warehouse. Mr. Pond saw me before I got away with it. He made me drive around the warehouse and take it through—take it out of the back end of the warehouse, instead of the front" (318).

This too would seem a slight intimation from the railroad company that its right of way was not a street which the public were free to use as they pleased.

There seems, likewise, to have been a remarkable consensus of opinion on the part of municipality, citizens, and railroad that it was not a street. The acts of early days convict some estimable gentlemen of considerable forgetfulness, apparently, when they now testify as to what was understood then. The increasing business of the company necessitated the construction of a freight warehouse in 1882, as above remarked, which was planned to be constructed in Railroad Street and across Post Street, one of the intersecting streets of Railroad Addition. The work was objected to by the people of Spokane, not because the building was on Railroad Street, but because it was across Post Street. Testified Johnson, one of

complainants' witnesses, who constructed the building:

> "The reason I know the foundation for the freight depot was built across Post Street is because a committee of citizens of Spokane stopped me from building; said I was building across the street; and I telegraphed to Sprague, and they made me take thirty feet off that and put it on the east end. That moved it east of Post Street—cleared the street."

It is rather remarkable that if the people of Spokane in 1882 believed that Railroad Street was a public highway, the same objection was not made to putting the freight building in the middle of that street that there was to the placing of it in the middle of Post Street.

No further controvery arose concerning the railroad company's right to use Railroad Street as it pleased until several years after the fire of 1889. A new freight depot was built two blocks long, reaching from Howard west to Post.

> "We objected very seriously to obstructing Mill Street * * * They never took it down until the court compelled them to" (Gandy, 231).

Upon these objections there followed in 1892 the litigation between the Northern Pacific Railroad Company and the City of Spokane which is reported in 52 Fed., 428; 56 Fed., 915; 64

Fed., 506. The nature of the conflicting claims which occasioned that litigation is thus stated in 52 Fed.:

> "The complainant, for the transaction of its freight business at the city of Spokane, has in use a cheaply constructed wooden warehouse, situated within the limits of its right of way. This structure was only designed for temporary use, and was hastily built immediately after the conflagration which occurred on the 4th of August, 1889, and is upon the site of the freight depot theretofore in use, and which was consumed in said conflagration. There is a controversy between the railroad company and the City of Spokane as to the title to part of the ground covered by said warehouse, the railroad company claiming that its title is perfect, and the city claiming that, by act of the railroad company, part of the ground covered by it was dedicated to the public for a street; that it is an obstruction of a public street, and therefore a nuisance, and on that ground the officers of the city propose to tear it down, and also to prevent the railroad company from erecting a new freight depot covering any part of the ground within the limits of the alleged street."

The controverted points were thus enlarged upon in the 56th Fed. when the final decree was rendered below:

> "The question in the case is whether Mill street in the City of Spokane is a continuous thoroughfare across the right of way of the Northern Pacific Railway, or across Railroad street, in which the tracks of said railway are

laid, or whether said Mill street is interrupted so that the area within the lines of said street extended across the right of way is private property, to which the Northern Pacific Railroad Company has the exclusive right." * * *

"Said plat shows Mill street extending continuously across Railroad street, and the evidence in the case shows the same to be a continuation of Mill street in the original town. * * *

"There is no rule or reason to support the contention of the complainant that by the inscription on the plat an exception is made of Railroad street, so that the streets at right angles therewith terminate at the margins thereof. The marginal lines of Railroad street upon the plat are not extended across the intersecting streets. The area of the intersection of the two streets appears to be as much a part of Mill street as of Railroad street, and there is nothing upon the plat indicating an exception or reservation of any part of Mill street, nor of an intention that said area should not be a place for people to cross the company's right of way and tracks. * * *

"I assent to the proposition that the corporation cannot lawfully dispose of its right of way granted by congress, so as to defeat the purpose of congress in making the grant. But certainly the railroad was intended to be a public benefit and aid to the development of the country, and not to be a barrier. It was contemplated that towns and cities would grow up along its line and that the coming and going of people to and from the company's depots and stations, and the transaction of business there, would necessitate the location of streets crossing the right of way. The grant is sufficiently liberal to admit of such

crossings without crippling the railroad or impairing its usefulness. I think that the dedication of the streets in Railroad addition cannot be held to be ultra vires, consistently with a reasonable construction of the act creating the Northern Pacific Railroad Company. Its officers have not so construed the franchise in transacting the company's land business. When the plat was made, Spokane was but a prospective city, and energetic people have since made it an actual city, covering a large territory on both sides of Railroad street. To now cut the city in twain by decreeing that the right of way is, in contemplation of law, a wall without gates or passageways, would be the perpetration of a monstrous wrong. The necessities of the company do not require this."

They were stated thus in this court:

"The Northern Pacific Railroad Company brought a suit against the City of Spokane and others to restrain and enjoin the defendants from laying out and extending a certain street known as 'Mill Street,' over and across the right of way of the complainant's railroad in said city. The bill alleges that by virtue of the act of congress approved July 2, 1864, entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the Northern route,' and the several acts amendatory and supplemental thereto, there was granted to the complainant a right of way through the public lands, to the extent of 200 feet in width on each side of its road, wherever it may pass through the public domain, and that there was further granted to the complainant for aid in the construction of its road, among other lands,

section 19, township 25 N., range 43 W., upon which that portion of Mill street in controversy in the suit is situated; that since the construction of the complainant's road, and for more than eight years prior to August 4, 1889, the complainant maintained its freight station building on that portion of its right of way lying north of its track in said section 19, covering the land in controversy, and that on or about said last-named date the freight sheds and freight station buildings were destroyed by fire, but that within a few days thereafter the complainant rebuilt the same, with the knowledge and acquiescence of said city and its officers; that the said city claims to have some right or interest in the ground, and the right to occupy the same as a street, but that the city has no right thereto, and has taken no steps as required by law to authorize its occupation thereof for any purpose, but that the said city, through its council, has declared its intention to summarily tear down and remove said buildings, and to open the said Mill street across the complainant's premises. The defendants answered, in substance, that the complainant had dedicated said strip of land to the public as a street on the 20th day of January, 1881, and that the public had continuously used the same from that time. * * *"

Commenting upon the evidence, this court said further:

"The evidence is that about the year 1880 or 1881, after the town of Spokane had been laid out and platted by the original townsite proprietors, the railroad company laid out what is known as "Railroad Addition," adjacent to the original town, and, by agreement

with the original townsite proprietors, made the streets of the addition conform to those of the original town, continuing the streets and the names thereof through the addition and across the right of way, and thereupon filed a plat of the addition, upon which its right of way was designated as 'Railroad Street,' and certain streets were platted as crossing the same, among which was Mill street. There is no indication upon the plat that it was the intention of the railroad company to close Mill street where the same crosses Railroad street, but, on the contrary, the lines of the plat show Mill street to be open across Railroad street. In the words of dedication which accompany the plat, however, the railroad company used the following language:

"'The streets shown upon said plat are dedicated to the use of the public until vacated, except that strip of land, 225.7 feet in width, designated as 'Railroad Street,' which is reserved for the tracks and uses of said railroad company.'

"It is contended that the words of reservation concerning Railroad street operate to except from the dedication all the land contained within the north and south lines of that street, and to cut in twain the streets which upon the plat are indicated as crossing the same. It is obvious that the plat and the words of dedication are to be construed together in arriving at the intention of the dedicator. With this rule of construction in view, it is clear that Railroad street is reserved from dedication to public use, so far as it is necessary to be retained for the tracks and uses of said railroad company, but that at the same time, and coexistent with the reservation, the company has granted by its dedication to

> the public the easement to cross its tracks and right of way at certain fixed and designated points; namely, at the streets which are marked as crossing the same. If it had been the intention of the company to withhold from the public the right to cross its Railroad street by the streets which intersect it at right angles, that intention could have been readily expressed, either in words or by lines drawn in the plat to close the cross streets at their point of intersection with the lines of Railroad street. The action of the company from the time of laying out Railroad addition is in harmony with this interpretation of the dedication. The evidence is, that the cross streets, including Mill street, Post street, Howard street, and others, were used by the public from the time the plat and dedication were filed; that the railroad company expressly admitted the rights of the public in Post street where it crosses Railroad Street, by removing therefrom, at the demand of the city, a building then in course of construction, which encroached upon the lines of the street."

These several opinions show in such fashion that the fact cannot be gainsaid that it was alleged upon the one side and admitted by the other in that litigation that Railroad Street was the private right of way of the Northern Pacific Railroad Company, and that the case turned wholly upon the question of whether the railroad company had power to dedicate Mill street across the right of way, and if it had such power, whether it had done so. Here is a practical

construction of the effect of the platting of Railroad Addition of convincing force. The litigation arose when all the facts connected with the platting of Railroad Addition and the understanding of the railroad company and of the citizens of Spokane with respect to the character of Railroad Street, whether it was indeed a public highway, or the private right of way of the railroad company, were freshest in the minds of everyone. The railroad company was not only asserting its right to put a permanent building in the center of Railroad Street on the ground that Railroad Street was its private right of way, but it was denying, upon the same ground, the right of the public to even cross Railroad Street upon one of the intersecting streets. The litigation was one which was bound to arouse great interest, as a controversy between a municipality and a railroad company over the blocking of a street by a railroad company always does. Furthermore, the testimony of Johnson concerning the protest which was made by a number of citizens in 1882 against building a freight warehouse across Post street, and the testimony of Gandy as to the objections which were made to the building of the warehouse across Mill street, which caused the litigation under

discussion, show that the people of Spokane generally were interested in the litigation and observing its course. Also, the senior counsel for complainants in this case was the senior counsel for the City of Spokane in that case. He came to Spokane in 1884, as his testimony in this case shows, and he says that when he came and for several years after, until the time of the fire at least, Railroad Street was much used for public travel; a street, he considered it. Now in 1892 the platting of Railroad Addition was as effective as a dedication of Railroad Street to highway uses as it is today. In 1892, also, if complainants' counsel are now sound in their views, Railroad Street had become a highway by user irrespective of any question of statutory dedication. Why were the points now so strenuously insisted upon not suggested then? Everything had then been done which could be done to make of Railroad Street a public highway. The use of the street by the public, whatever its character, was fresh in the minds of the city's counsel and of the people of Spokane who were urging on the litigation. Can it be that time was required to sharpen the observation of these pioneer citizens of Spokane so that they can see clearly through the mist of years that concerning the nature of the public use of

Railroad Street and its consequent devotion to public highway purposes which was not apparent at the time? Can it be, also, that time was required to ripen the faculties of the distinguished gentleman who appeared for the city in that litigation and for the complainants here so that legal points which were then not discernible now stand forth the palpable truths he asserts them to be? Some such explanation must be found, else it must be said that that litigation, standing alone, is conclusive against the claim now made. In that litigation, both parties assumed that Railroad Street was the private right of way of the railroad company, and the sole question presented in that case by pleadings and evidence was whether Mill street had been opened across it. If at that time it had even been supposed by anyone that Railroad Street was itself a street, that would have been made the prime question in the case, for if it was a street, all the wrangle over the effect of the dedication of Mill street would have been idle.

In our discussion of the Mill street litigation and of the position taken by the city's counsel in that case, we have been guided entirely by what appears in the several opinions in which the issues were stated. The opinions rendered

in that litigation seem to indicate clearly that the City of Spokane did not contend that Railroad Street was a public street, for if such a contention had been made, we assume that the lower court or this court would have noticed it somewhere in their opinions, and if it had been urged would not have made the case to turn upon the question of whether Mill street was dedicated across Railroad Street. If reference to the briefs in this court should show that the point was urged upon the courts, then we tender our most profound apologies to Judge Turner for having suggested that he was not, in 1892, gifted with the same clairvoyance for legal points that he possessed in 1913. He will have to take whatever of comfort there may be in such apologies, however, with the knowledge that if the question was raised in that litigation, then it has passed into the realm of *res adjudicata,* for the decisions therein are clearly inconsistent with the right to claim that Railroad Street is a public highway.

It is worthy of remark, too, that the ripening of the faculties of complainants' senior counsel to the point where he perceived Railroad Street to be a public highway has been a slow matter. As late as 1908, five years before the present action was brought, a circular was sent out pro-

testing against the plan of grade separation with respect to the Northern Pacific tracks, which was then proposed. Judge Turner thinks he wrote this circular. He certainly signed it. In that circular it was said:

> "The only possible argument in favor of granting the right demanded by the railroads is the danger from maintaining the tracks of the Northern Pacific Railway in their present conditions. But that condition cannot long be maintained. It is onerous and expensive to the railroads and if the people of Spokane do not weakly yield to the present project of dismembering and disfiguring the city and rendering a great part of it uninhabitable, it will not be long before the Northern Pacific Company will itself devise another way of getting through the city and of utilizing its very valuable right of way property for some other and more desirable purpose."

It is clearly apparent from the language used that Judge Turner no more supposed in 1908 than he did in 1892 that Railroad Street was a public highway, but considered it on both such periods to be the private right of way of the Northern Pacific Railway Company.

The gentleman, however, is not singular in that respect, but finds himself all the way through in the very excellent company of the City of Spokane. It is not pretended that the City of

Spokane ever assumed jurisdiction over Railroad Street as a street, or attempted to improve and make use of it as a street. It is not claimed that the City of Spokane ever questioned the right of the Northern Pacific Railway Company to put tracks in the street whenever and wherever it pleased, and to make all desired uses of it for railroad purposes, or to put permanent buildings in it wherever it pleased so long as it did not obstruct the intersecting streets. The euphemistic "encroachments" of complainants' counsel have gone on unprotested against until 100 feet of Railroad Street throughout its whole length has been solidly built up with substantial brick buildings. As time went on and the city grew, the intersecting streets were first graded and then paved. For all such purposes, local assessment districts were formed, embracing the property abutting upon such intersecting streets which would be benefited by the improvement, and always, in such case, Railroad Street, at the points where it abutted upon the intersecting streets on either side, was included within the assessment district as the private right of way of the company, and was assessed for the cost of the improvements, the railroad company paying such assessments as required by the city (Record

344, 346). Furthermore, Railroad Street through the city was included by the company in its tax returns as the private right of way of the company, taxes were assessed against it for general purpose, and taxes were paid thereon by the railroad company. *Idem.*

Then there is the final action which appears here of the City of Spokane ordering a grade separation, to be effected by the construction of a solid embankment occupying substantially all that is now left of Railroad Street and extending through its entire length. If Railroad Street is indeed a public highway, the ordering of a use of it which would totally destroy it for highway purposes, was a wholly unwarranted usurpation of power and one of which the city council could not have been ignorant in view of the decision of the Supreme Court in *State ex rel Schade Brewing Company v. Superior Court,* 62 Wash., 96. The *Schade* case was decided on February 4, 1911, and involved the action of the city council of Spokane. The ordinance in question was passed on February 16, 1912, so it was passed in full view of the *Schade* case, and the action of the council can only be sustained on the theory that the city did not believe that Railroad Street is a public highway.

Turning now to the legal phase of the question under discussion.

First we say the user of Railroad Street by the public was not for such a length of time as under the circumstances would establish it a public highway. The use did not commence earlier than 1881, for no one claims there was any travel along Railroad Street any more than there was over any other vacant space in the village of Spokane Falls until people began to go along it in order to reach the depot building. Use of it in a way which at all resembles use for highway purposes ceased with the fire of August 4, 1889. It is not pretended that after that time the strip was used in any fashion which smacked of street use by the public. The witnesses say that directly after the fire railroad tracks were put down in all directions and the railroad company used it for the storage of cars and the loading and unloading of cars all through the addition. Almost immediately after the fire, also, the warehouses which now occupy so much of the street began to be constructed along it.

> "Since the fire the strip of land where that driveway was has been leased for railroad warehouses. A good portion of it is now covered by warehouses. It has been so occupied by railroad warehouses since the time imme-

> diately after the fire. This driveway has ever since 1889 or 1890 been entirely covered by warehouses. And the same thing is true all the way from Washington street west to Adams." (Gandy, 229).

Also Gandy says:

> "Up to the time of the fire there was never any interruption of the use of Railroad Street by the railroad company that I remember of" (225).

Without occupying space with quotations from the testimony of all the witnesses, it is sufficient that they all fix the time of the fire as the period up to which there had been use of Railroad Street for highway purposes. Complainants' counsel, indeed, substantially admit that the period of use as for highway purposes must be limited to end with the fire in 1889. They could scarcely admit less, so unequivocal were the acts of the railroad company in denial of the right to use Railroad Street for highway purposes from that time.

§5657, 2 Remington & Ballinger's Code reads as follows:

> "All public roads and highways in this state that have been used as such for a period of not less than seven years, and are now so used, where the same have been worked and kept up at the expense of the public, are hereby declared to be lawful roads and highways within the meaning and intent of the

> laws now existing governing public roads and highways in this state."

This act has no application save when the land in controversy has been worked and kept up at public expense.

State v. Seattle, 57 Wash., 616.

There is no claim that the public authorities ever did any work on Railroad Street, or that public money was ever expended on it.

A public highway may, of course, be acquired by prescription, though no public work has been done or public money expended upon it. But in such case the period of use must be the same as the period of limitation for quieting title to land.

> "But this statute does not apply to roads which have been used adversely for a period of time sufficient to constitute a road by prescription without public expense thereon. It applies to cases only where public work and money have been expended. In such cases seven years' user is made sufficient. In other cases the prescriptive period is co-extensive with the period of limitation for quieting title to the lands. *Wasmund v. Harm, supra.* The purpose of this statute was evidently to lessen the prescriptive period, when public work and money had been expended. It does not affect the rule in cases where no public work has been done."

Seattle v. Smithers, 37 Wash., 123, 124.

That period is ten years under §156, 1 Remington & Ballinger's Code, which reads as follows:

> "The period prescribed in the preceding section for the commencement of actions shall be as follows:
>
> Within ten years—
>
> 1. Actions for the recovery of real property, or for the recovery of the possession thereof; and no action shall be maintained for such recovery unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question within ten years before the commencement of the action."

It was squarely held in *Petterson v. Waske,* 45 Wash., 307, that the period necessary to establish a highway by mere adverse use was ten years.

It follows there was no use here for such a length of time as would fix Railroad Street as a public highway. No doubt portions of Railroad Street were occasionally used in limited fashion as a passage way after 1889. Travel of some sort is never entirely suspended, even through railroad yards, for members of the public will occasionally have business there or find it convenient to pass through. The vital factor in the situation, however, is that the acts of undeniable hostility to public use which marked the conduct of the railroad company from 1889 on, affected

the whole strip, such acts not being confined to any portion of the strip, but extending over the whole thereof.

Quite apart from the question of time of use, however, the authorities make it perfectly clear that the use here, considered in the light of all the circumstances which mark its character, was not sufficient to fix upon Railroad Street the character of a public highway. The use by the public of that strip of land was plainly permissive, and was plainly understood by the public to be so, for as the railroad company from time to time took possession of the portions of the strip for which it had theretofore had no use, and when it built almost half the strip up solidly with substantial buildings, no objection was made by the public. These things, taken in connection with the special assessments levied against the land in the strip for the purpose of paying the cost of improving the streets running across it, and the levy of general taxes thereon, clearly mark the use as being of the purely permissive character which has never been held sufficient to establish the existence of a street.

In *Dahlstrom v. Anderson,* 56 Wash., 575, it was sought to establish a highway both by statutory establishment and by adverse user. Hold-

ing the evidence insufficient to establish either, the court said, in commenting upon the evidence:

> "When travel first began along the route over which the road was attempted to be established, the country was open and remained so in its greater part for a considerable period of time. During this period the travel seems to have followed substantially one general way; but as the country gradually settled up, changes were made in it to suit the convenience of the settlers, seemingly without regard to the claim that the public had a right to a particular way. This change was so complete that at the time of the trial no part of the original way, unless the particular strip in question here be an exception, remained in existence as a way. Indeed, it was shown that many of the buildings, and among them the city hall of the city of Ballard, were erected on the line of the road as it was shown on some of the earlier maps, and that a public school building of the same city was erected in what was once the traveled way. Then again, the entire way through this particular block had not been opened for a number of years. It was shown that former owners of that part of block 49 lying immediately west of the tract here in question closed it for travel to the public at its western extremity several years prior to the trial, without protest from any of the public authorities, and that they left that part of it open which is now the property of the respondent for their own convenience, permitting such use of it as was made by the public through sufferance rather than as a matter of right. Moreover, there has been no demand for this particular tract as a public way for many years. The surrounding country has long been

> platted into lots and blocks, with streets and cross-streets open to public use, and these streets now furnish, and have long furnished, all necessary ways for the public at large. The foregoing facts seem to us to argue conclusively against the claim of a public way, and as the appellants do not contend that they have individually a right of way over it, we think the judgment should stand affirmed, and it will be so ordered."

The pertinency of this decision to the facts in the case at bar scarcely needs be pointed out. The evidence of the complainants' own witnesses establishes that during the period in which they attempt to show a public use, the travel along Railroad Street was induced solely by the fact that it was a smooth, level piece of ground, while the surrounding land was unfitted for travel because of its roughness and rockiness, and that all during that period the people of the village traveled as they pleased over any vacant ground, and that if there was more travel over Railroad Street than over any other vacant ground there, it was solely because of the character of the land in it. The evidence shows too that the travel was in no way restricted by the street lines, but went as much upon the land which was platted into lots and blocks abutting thereupon as on the marked street space. Neither was there any definite and certain roadway, but people went

wherever convenience dictated. There were present very early the elements of obstruction, of final complete blocking, and of no necessity, which are remarked upon by the Supreme Court of the state in the case just above cited.

In *Forster v. Raznik,* 46 Wash., 692, the court held the existence of an alley was not established under the following evidence:

> "It appears that this strip of land was, by the makers of the plat of one of these additions, some years after the filing of said plat, conveyed, or attempted to be conveyed, to Frank H. Graves, by warranty deed, in October, 1885, and after various mesne conveyances, a deed thereof was made by one of his successors in interest, to the respondents Raznik. The ground appears never to have been used at any time as an alley. In 1887 the city council of Spokane adopted a resolution reciting that, whereas there was some controversy concerning the matter, they were of the opinion that the city had no vested right in said ground, and thereby disclaimed all rights to the same as a public alley or highway. Subsequently the city appears to have assumed a different attitude, although it did not open or use the strip as an alley. It has been assessed annually, with possibly one or two exception, since 1885, by or for the city, and the taxes were always paid. Special assessments were also levied against it by the city for the improvement of Riverside avenue, Bernard street, and Sprague avenue, some of these having the effect of lessing the amount assessed upon appellants' property abutting thereupon. A building was erected thereon in

> 1887, and a permanent building in 1897. The defendants Raznik and their predecessors appear to have been, for more than twenty years last past, in the actual, open, and notorious possession, under color of title and claim of ownership. Neither appellants nor their ancestors are shown to have objected to this possession, or to have made any protest against the improvement or occupation of said strip of land by said defendants and their grantors. There was evidence that, when these defendants constructed the permanent building referred to, the west wall thereof was connected with the east wall of a building owned by these appellants or their predecessor in interest, by consent."

Travel over a strip of land which appears to have been permissive in character, and which, upon claim being made that the strip was a highway, was disputed by the owner of the land through the erection of obstructions, etc., thereon is insufficient to establish a highway by adverse use.

Stohlton v. Kitsap County, 49 Wash., 305.
Megrath v. Nickerson, 24 Wash., 235.

Where vacant unenclosed land was traveled over by people at will, and such use was made of it generally as is usually made of unenclosed property by people who reside near it, and where the travel had no fixed or definite track, there is no establishment of a roadway by prescription. So holding, the court said:

> "The character of the use necessary to establish a highway by user has been often before this court. We have held that the use to be sufficient for that purpose must be an actual, uninterrupted, continuous use by the general public under a claim of right for a period of ten years; that it must be adverse to the owner of the property, and while such owner is without disability in law to assert and enforce his rights; and that use by license or permission of the owner, or while he is under disability, is not such a use as will create a public easement."

Petterson v. Waske, 45 Wash., 307.

The board of county commissioners obtained from the owner of lands a temporary dedication or grant of a right of way across it for the use as a county road. The road was used for about eighteen years in all by persons desiring to travel over it. The county at different times refused to expend public money on the strip in controversy, either because it had no right of way, or because it was in dispute. The owner paid taxes on the land embraced in the right of way and at different times maintained gates across it to exclude stock. It was held there was no highway.

Scheller v. Pierce County, 55 Wash., 298.

Turning from state cases which were cited first for the reason that they are controlling upon this question so far as their facts are analogous, we

find in the decisions of other states facts more nearly analogous to those here present. The cases are too numerous and the facts in each of them are stated too much in detail to permit comment upon them individually. We select the case of *International, etc., Co. v. Cuneo,* 108 S. W., 714, as illustrative of them all, not only because the facts stated in the opinion tend much more strongly to establish the dedication of a street than do the facts appearing here, but also because in the opinion the rules are well stated which govern in determining whether there has been a dedication. We quote the material portion of the opinion, but must ask the court to read the original report to obtain the facts.

> "In order to constitute a dedication, it is essential, 'first, that there be an intention upon the part of the proprietor of the land to dedicate the same to public use; second, that there be an acceptance thereof by the public; and, third, that the proof of these facts be clear and satisfactory. The vital and controlling principle is the animus donandi, and whenever this is plainly manifested on the part of the owner of the soil, either by formal declaration or by acts from which it may fairly be presumed, such as should equitably estop him from denying such an intention, the dedication, so far as the owner is concerned, is complete. Without such manifestation of intention by either of said modes it cannot be said that a valid dedication is possible. To make a sufficient dedication

the proprietor of the soil must devote the portion thereof intended for public use to such use, and, on the part of the public, it must be accepted and appropriated to that use. The acts on the part of the donor and the public of an intention to dedicate, accept, and appropriate the lands to public use, where the dedication is relied upon to support some right, must be clear. A dedication is not an act of omission to assert a right, but is the affirmative act of the donor, resulting from an active, and not a passive condition of the owner's mind on the subject. A mere nonassertion of right does not establish a dedication, unless the circumstances establish a purpose or intention to donate the use to the public."

Other cases fully sustaining the case referred to on facts more or less like those in the case at bar are:

Williams v. Ry. Co., 39 Conn., 509.

Wilson v. Land Co., 39 So., 303.

Loomis v. Lighting Co., 61 At., 539.

Georgia, etc., Co. v. Atlanta, 45 S. W., 256.

Cincinnati, etc., Co. v. Roseville, 81 N. E., 178.

Bacon v. Ry. Co., 76 Atl., 128.

New York, etc., Co. v. Ossining, 126 N. Y. Supp., 517.

New York, etc., Co. v. Ryan, 129 N. Y. Supp., 55.

Baltimore, etc., Co. v. Seymour, 55 N. E., 953.

Chicago v. Ry. Co. (Ill.), 38 N. E., 768.

White v. Bradley, 66 Maine, 254.

Frankford, etc., Co. v. Philadelphia (Pa.), 34 At., 577.

Sioux City v. Ry. Co., 106 N. W., 183.

It is said in complainants' brief:

> "If 'the use of this strip of land from 1881 to 1889 was but natural under the circumstances,' as found by the learned judge below, then the head notes to Hogue v. City of Albina, 10 L. R. A., 673, quoted in the opinion, was quite sufficient to sustain his decision that that use was wholly insufficient to constitute a common law dedication. But if that use was in the highest degree unnatural, except on the theory that the strip of land was intended to be devoted to public use as a street, then the principles to which complainants appeal must prevail, and there was a common law dedication."

We are quite willing that our case on this point be tested by the touchstone there proposed. Wherein was there anything "in the highest degree unnatural" in the use of the tract in question during the '80s, as that use is shown by the evidence? Wherein is there inconsistency between such use and the intention of the Railroad Company to devote the street wholly to railroad purposes as its needs should require? The tract was smooth, level gravelly. The land lying

around it was rough, broken, rocky. The Railroad Company needed to use but an insignificant part of the tract. The remainder lay vacant and unused, just as did all the land surrounding it. Whenever the Railroad Company found need to use additional portions of the tract, it did so, and no one disputed its right in that behalf. How unnatural it would have been for the Railroad Company to have denied the public the right to go along and across this vacant strip as their convenience might require, just as they did upon any of the other vacant land lying round about, when such use of it by the public in no manner trenched upon the railroad use! What an act of unreasonable arbitrariness, prompted by nothing but mere wish to annoy and vex, it would have seemed if the Railroad Company had in those early days fenced up this vacant strip, or in any other way denied the right of the public to go upon it! To so act would not only have been unnecessarily vexatious to the people of the town, but it would have been contrary to the best interests of the company. The business part of the town the testimony shows to have been along Howard street, which was three blocks east from the depot building, two or three blocks north from Railroad Street.

Because of the broken, rocky character of the ground lying directly between the depot building and the business district, travel by wheeled vehicles could only go, and by other means of locomotion could most easily go, by way of Howard street to the level railway track, and thence west to the depot. Furthermore, it was convenient for the company, the evidence shows, to leave cars standing upon the sidings into which and from which the freight could be loaded and unloaded without the necessity of warehousing. Instead of the use which was permitted of Railroad Street being in any way unnatural in view of its ownership by the Railroad Company, it was in the highest degree natural in that connection.

But while on the subject of naturalness and unnaturalness, what shall be said of the use which was made of the strip by the Railroad Company if it be supposed that the Railroad Company intended to dedicate and the public intended to accept the strip as a public highway? With the so-called dedication of the street went the placing of a permanent building in it. In 1882 another permanent building was placed upon it. All along, as railroad needs required, additional tracks were placed where the Railroad Company

pleased. A citizen of the community was forbidden to take his wagon to a particular place in it for the purpose of loading it. Cars were placed on the sidings for loading and unloading and left there at pleasure, and portions of the strip otherwise unoccupied were used for storage purposes as the Railroad Company pleased. Finally the Railroad Company assumed the right to lease to individuals space for wholesale and ware houses upon it, and this has proceeded to the point where half of the platted street has been solidly occupied by such houses. Is there not in this a considerable degree of unnaturalness if it is supposed that the strip was intended to be or became a street? Truly we think that complainants' counsel have proposed a test which must destroy their case.

V.

Other Points.

We have no doubt of the soundness of complainants' fifth position, *viz.*, that if the strip of land in controversy is a street, the separation of grades may not be accomplished as the City of Spokane has ordered. The Supreme Court of the state has said in most unmistakable fashion that it is beyond the power of a munici-

pality to permit or require any use of a street, or alteration in its surface, which is incompatible with its use for street travel. The right of a railroad company to use the street and the interests of public safety where a railroad is laid in or across a street, must yield to the paramount necessity that street travel along the street be not interfered with. It is such holdings of the Supreme Court, indeed, which mark impossible the joint occupation of Railroad Street by the public for purposes of public travel and by the Northern Pacific Railroad Company for railroad purposes, and which, by so marking, put beyond peradventure that the Northern Pacific Railroad Company had no power to dedicate its right of way to street uses.

As to the sixth point, that the City of Spokane was not a necessary party to this action, while we think the contrary it seems needless to argue the question at length here. Had a decree been rendered in complainants' favor, it would then have been necessary for the court, we consider, to have required the City of Spokane to be brought in so that in the one decree the rights of all parties in Railroad Street and in the intersecting streets might have been settled. It will be time enough when the courts have determined

that Railroad Street is a public street to determine what parties are necessary to a decree which shall finally fix the rights of all who will be affected by such a decree. Should that time ever come, we think there can be no question but that it will be necessary to bring in the City of Spokane, for it, beyond any other individual or corporation, is entitled to be heard as to what it may think necessary or proper with respect to its streets.

Respectfully submitted,

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